Supreme Court, U.S.
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No. 90-6588

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JAKE AYERS, JR., *et al.*,
Petitioners,

v.

RAYMOND MABUS, Governor,
State of Mississippi, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred by holding that Mississippi officials, who had created a "separate and unequal" system of higher education (PA 114a, 169a),* could avoid dismantling that system, and could wholly satisfy their "constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures" (PA 26a, footnote omitted)?

2. Whether the court of appeals erred by failing to apply a Title VI regulation addressing defendants' remedial obligation, *i.e.*, 34 C.F.R. § 100.3(b)(6)(i) (PPA 89),** in a manner consistent with administrative standards (PPA 90-96), explaining the application of that regulation to state-created, separate and unequal systems of higher education?

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* PA [page number] U.S. petition appendix—citations to three lower court opinions

** PPA [page number] Private petitioners' petition appendix

JA [page number] Joint Appendix

PX [#] private plaintiffs' exhibit; USX [#] U.S. exhibit; DX [#] defendants' exhibit

Tr. [page number] trial transcript

PARTIES TO THE PROCEEDING

1. This is a class action. The named plaintiffs, petitioners, are as follows:

Jake Ayers, Sr.
Jake Ayers, Jr.
Hattie James
Margaret James
Leola Blackmon
Lillie Blackmon
Shirley A. Porter
Kenneth Spearman
James T. Holloway
Dave Collins
Lewis E. Armstrong
Darryl C. Thomas
Albert Joe Williams
George Bell
Johnny Sims
Thelma H. Walker
Randolph Walker
Bennie G. Thompson
Virginia Hill
B. Leon Johnson
Pamela Gipson
Janice K. Miggins
Floyd Alexander

2. The defendants-respondents are state agencies and officers. They are as follows:

(a) William Allain, in his official capacity as Governor of the State of Mississippi and his successor, Ray Mabus.

(b) The Board of Trustees of State Institutions of Higher Learning of the State of Mississippi.

(c) The individual members of the Board of Trustees of State Institutions of Higher Learning, in their personal and official capacities: Cass Pennington, Joe A. Haynes, Dianne Miller, Nancy McGahey Baker, Frank Crosthwait, Jr., Will A. Hickman, J. Marlin Ivey, Bryce Griffis, William M. Jones, James W. Luvene, Dianne Walton, and Sidney L. Rushing.

(d) Delta State University, and its president, F. Kent Wyatt, in his official capacity.

(e) Mississippi State University, and its president, Donald W. Zacharias, in his official capacity.

(f) Mississippi University for Women, and its president, Clyda S. Rent, in her official capacity.

(g) The University of Mississippi, and its chancellor, R. Gerald Turner, in his official capacity.

(h) The University of Southern Mississippi, and its president, Aubrey K. Lucas, in his official capacity.

(i) W. Ray Cleere, in his official capacity as Commissioner of Higher Education of the State of Mississippi.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The en banc opinion of the court of appeals is reported at 914 F.2d 676 and is reprinted in the appendix to the petition in No. 90-1205, United States v. Mabus (Pet. App. 90-1205 at pp. 1a-44a). The panel opinion of the court of appeals is reported at 893 F.2d 732 (Pet. App. 90-1205 at pp. 45a-103a). The opinion of the district court is reported at 674 F. Supp. 1523 (Pet. App. 90-1205 at pp. 104a-201a).

THE GROUNDS FOR INVOKING THE JURISDICTION OF THE COURT

The judgment sought to be reviewed was entered on September 28, 1990.

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

THE LEGAL PROVISIONS INVOLVED IN THIS CASE

The legal provisions involved in this case, and set forth in the private petitioners' petition appendix, are (a) the Fourteenth Amendment to the Constitution of the United States, (b) 42 U.S.C. § 1983, (c) 34 C.F.R. § 100.3(b)(6)(i) (PPA 89), and (d) the "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," 43 Fed. Reg. 6658 (Feb. 15, 1978) (PPA 90-96).

STATEMENT OF THE CASE

After *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and *Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam), Mississippi did not voluntarily desegregate its universities. To the contrary, the state resisted the law of the land with vigor.

In 1962, the Court of Appeals for the Fifth Circuit found that the state "maintain[ed] a policy of segregation in its schools and colleges," and ordered the admission of James H. Meredith to the University of Mississippi. *E.g.*,

Meredith v. Fair, 305 F.2d 343, 345 (5th Cir.), cert. den., 371 U.S. 828 (1962). Enforcement of the court's order required the employment of "U.S. marshals, U.S. army troops, and federalized Mississippi national guard troops." USX 636, p. 20, #57. Two other suits were later necessary to desegregate the law school and summer session at the University of Mississippi. *Id.* at 21, #'s 59, 60.

In 1973, the Office for Civil Rights of the U.S. Department of Health, Education and Welfare ("OCR") found "that [Mississippi's] dual system ha[d] not yet been fully disestablished" (JA 197) in violation of Title VI of the Civil Rights Act of 1964 and the implementing regulation. JA 196.[1] OCR also found the state's then-current version of a remedial plan to be inadequate. "With few exceptions, the submission states policies of prospective nondiscrimination in various aspects of the higher education process, without detailing actions which will eliminate the effects of past racial segregation under law." JA 204.

In 1974, the governing Board of the Mississippi higher education system, a defendant herein, adopted the "Plan of Compliance." PA 118a-19a. While OCR rejected the plan, the Board "instructed the presidents of each university to implement [it] . . . to the best of their abilities within the resources available." PA 118a. However, the legislature provided "meager" resources (JA 1445-46), only 40% of the funds belatedly sought. See p. 13, *infra*.

This action was initiated in 1975 by 23 black Mississippians, alleging that state officials were denying them equal educational and employment opportunities in the operation of the higher education system. Plaintiffs' claims are based in part on the Fourteenth Amendment, as well as Title VI of the Civil Rights Act of 1964 and its implementing regulation. The defendants include the

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[1] OCR analyzed student enrollment and faculty allocation patterns (JA 197-200) and noted that recent construction and curricula changes "tended and will continue to tend to reinforce the continuing effect of your System's duality." JA 200.

Board of Trustees of State Institutions of Higher Learning and its members. Each university is "under the management and control of the Board . . . , whose authority is plenary." *Ayers v. Allain*, 674 F. Supp. 1523, 1524-25 (N.D. Miss. 1987). PA 105a-06a.[2]

In 1987, after the trial on liability issues, the district court dismissed the case (PA 201a), finding that defendants had satisfied their constitutional and statutory obligations regarding the state-created "separate and unequal" system. PA 114a, 169a. The Court of Appeals for the Fifth Circuit reversed and remanded for the development of a remedial plan. *Ayers v. Allain*, 893 F.2d 732, 756 (5th Cir. 1990). PA 100a-02a. Thereafter, rehearing *en banc* was granted, and the judgment of dismissal affirmed [*Ayers v. Allain*, 914 F.2d 676, 678 (1990)], with the majority holding in substance that more than 100 years of egregious discrimination in Mississippi's higher education system could be remedied by "race neutral policies." PA 2a.

It bears emphasis that the Mississippi system has never been subject to a detailed remedial order.[3]

STATEMENT OF FACTS

A. It is Undisputed That Mississippi Created and Operated a Separate and Unequal System of Higher Education from 1848 until 1962

The district court found that as of 1962, Mississippi was operating a dual and racially discriminatory higher education system. PA 169a. This structure began in 1848 with the establishment of the University of Mississippi exclusively for white persons. Alcorn State University[4]

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[2] The United States, stating Title VI and Fourteenth Amendment claims, intervened; the district court certified a plaintiff class. PA 105a, 108a.

[3] In 1981, the district court ordered that there be separate trials on liability and remedy. PPA 99. A subsequent request by defendants in 1986 for "a single trial on all issues" (PPA 99-100) was denied. PPA 101.

[4] This statement employs the current name of each school.

opened in 1871 "to serve *as an agricultural college* for the education of Mississippi's black youth" [PA 110a-111a (emphasis added)], but at least for its first 50 years, Alcorn operated primarily as an elementary and secondary school.[5]

The state next created four more colleges exclusively for white persons: Mississippi State University (1880); Mississippi University for Women (1885); University of Southern Mississippi (1912); and Delta State University (1925).[6] Finally, in 1940 Jackson State University opened to "[train] black teachers for the black public schools . . ." (PA 113a) and in 1950 Mississippi Valley State University began operating "for the purpose of educating teachers primarily for rural and elementary schools and to provide vocational training for black students." PA 113a.[7]

The state also structured professional offerings to favor its white citizens. The schools of law and medicine were provided solely for white persons under the aegis of UM as of 1854 and 1903, respectively. PA 110a. The Board also opened satellite centers allowing white persons to attend white schools rather than nearby HBIs. PA 169a. These included the Universities Center in Jackson competing with JSU and the Vicksburg and Natchez centers competing with ASU. PA 146a-150a.

In 1954, the Defendant Board published the "Brewton Report" (PA 114a-115a), which admitted that higher education opportunities for black citizens 'ha[d] been far less than those provided for other citizens" (JA 818), with "the goal of equality . . . still very distant." JA

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[5] Bureau of Education, United States Department of the Interior, *Survey of Negro Colleges and Universities*, 405, 416-17 (1928) (in 1926, of Alcorn's 702 students, 88 were in college, 377 in secondary school and 237 in elementary school).

[6] Census data reflects that during the period from 1880 through 1930, blacks comprised the majority of the Mississippi population. PX 200, p. 351.

[7] The universities are hereafter referred to as Historically White Institutions, *HWIs*: UM, MSU, MUW, USM and DSU; and Historically Black Institutions, *HBIs*: ASU, JSU and MVSU.

813. The Brewton Report described the vast program differences, as follows:

> [Higher education] opportunities [for black persons] . . . are limited in the three colleges to undergraduate training in teacher education, in agriculture and the mechanical arts, and in the practical arts and trades; whereas the needs of the white population are served by five colleges, with offerings extending from a variety of undergraduate programs through extensive offerings on the graduate and professional levels. . . .
>
> The State provides, through the University of Mississippi and other state colleges, ample opportunities for white students to pursue graduate and professional study; but the Negro student has been compelled to go outside the State for this service. . . .[8] JA 816.

The Board also cited other elements of the discriminatory system: (a) black citizens' lower college-going rates; (b) payment of lower salaries to black teachers; (c) conferring degrees upon white citizens at a rate almost six times that for black persons; (d) black persons' lesser participation in the "professions" of medicine, dentistry, pharmacy, law, and social work; (e) deficient facilities at ASU and JSU. PX 200, pp. 134-35, 148-50, 155; JA 816-818.

The Board also recognized that racial discrimination in elementary and secondary education in the state had an adverse impact on the participation of black youth in higher education. It detailed the many inequities (JA 813-14)[9] and wrote: "Opportunities for the Negro youth to get the basic secondary school training necessary for

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[8] This Court held such "compulsion" to be unconstitutional in 1938. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The state continued to fund this practice as late as 1970. USX 636, pp. 12-13, #'s 35, 36.

[9] Earlier, Mississippi forbid the teaching of black persons. See Miss. Revised Code of 1857, Art. 51.

college admission have been considerably less than for the white youth of the State." JA 813.[10]

Yet, recognition of a vast gulf did not bring remedies, perhaps because the Brewton Report viewed the "vast majority" of black youth as needing "[b]asic training in what may be called fundamental education which begins at the eleventh grade and ends with the fourteenth; . . ." PX 200, p. 151. The state did not comply with *Brown*. Through the 1950's (and until 1972), the 13-member Board was all white. PA 167a. In 1960, the State spent approximately twice as much on its white students as on its black students, $1351 to $718. JA 1386.

Accordingly, the district court found the Mississippi system of higher education to be "separate and unequal" in 1954 (PA 114a), and characterized in it more detail as of 1962 (PA 169a) as follows:

> . . . . Defendants' racially segregative policies at that time encompassed the areas of: (1) student enrollment, (2) maintenance of branch centers by the historically white universities in close proximity to the historically black universities, (3) employment of faculty and staff, (4) provision and condition of facilities, (5) allocation of financial resources, (6) academic program offerings, and (7) racial composition of the governing board and its staff. . . .[11]

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[10] Census data (1980) shows some of the consequences of discrimination—for more than 100 years—in elementary-secondary and higher education. In 1979, 44.4% of Mississippi's black citizens, but "only" 12.6% of white persons were parts of family units with proverty level incomes. PX 308(b). In 1980, "median years of school completed" were 12.4 for white citizens and 9.4 for black persons. PX 308(c). Proportions of persons who were high school graduates were white persons (63.9%) and black persons (32.7%). *Id.*

[11] The development of the pattern of gross discrimination in higher education throughout the region, and the heinous racial attitudes which produced and sustained it, are detailed in G. Kujovich, *Equal Opportunity in Higher Education and the Black College: The Era of Separate but Equal*, 72 Minn. L. Rev. 29, 44-113 (1978).

B. The Slow Pace of Initial Desegregation

Between the time of James Meredith's application to UM (1961) and his actual attendance (1962), the Board adopted—the district court explicitly found—a testing requirement for admission to the universities "because of . . . its adverse effects upon [black persons]." PA 120a, 179a. The other HWIs admitted their initial black students as follows: MSU and UM law school (1965),[12] MUW and DSU (1966), and USM (1967). PA 116a, USX 190. The HBIs first enrolled white students as follows: ASU (1966), JSU (1969), and MVSU (1970). PA 117a.

The Board "control[s] . . . the hiring of all faculty . . . ." USX 636, p. 5, # 13. Yet, not one black faculty member taught at an HWI until 1970-71, when desegregation began at MUW, UM and USM; it followed at DSU (1973-74) and MSU (1974-75).[13] PA 117a. Faculty desegregation began earlier at the HBIs, *i.e.*, ASU (1966-67), JSU (1967-68), and MVSU (1968-69). PA 117a.

In 1972, the first black citizen was appointed to the Board. However, four white persons were also appointed, with the Board consisting of 12 whites and a single black person (PA 167a, JA 1449), the picture obtaining when the complaint was filed.

C. The Separate and Unequal System Is Substantially Intact

The separate and unequal system is substantially intact. Black citizens' college-going and degree-granting

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[12] In 1954, the Board refused to admit Medgar Evers to the law school (USX 64, p. 379) and established a patently discriminatory *alumni* voucher requirement for admission to all institutions. See *Meredith v. Fair*, 305 F.2d at 352-53 (finding the requirement to be unconstitutional).

[13] One of the first black persons hired with "faculty rank" at MSU testified that she was placed "in the basement of the library" where "[s]ome days [she] did not see anyone", prompting "questioning from the black students . . . as to why [she] was hidden. . . ." (JA 1545-47).

rates remain unequal; indeed Board policy has caused their enrollment to decrease (just as other affirmative steps impeded disestablishment). Segregation of students and staff persists. Almost no black persons have been employed as administrators at high levels of HWIs. The Board continued its intentionally discriminatory testing requirement. To date, its admission criteria have denied the majority of black persons access to better resources at the HWIs, and been consistent with perpetuation of the dual system. Harassment of black students at UM has burdened their rights and deterred others from applying. The Board continues to offer less extensive, less well-funded programs, in less attractive facilities, to students (overwhelming black) at HBIs. Moreover, given these acknowledged disparities, the HBIs are not a real choice for white persons—which enrollment data confirms. Finally, discrimination in selecting Board members persisted.[14]

1. *College-Going and Graduation Rates Are Lower for Blacks Than for Whites, Dramatically So in Graduate and Professional Schools, and the Disparity Is Increasing*

As noted (p. 5, *supra*), the Board's 1954 report identified lower black college-going and degree-granting rates as elements of the discriminatory system. The pattern persists. The racial composition of Mississippi's population in 1980 was [PX 308(b)]:

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[14] The same formula used in 1972, of appointing one black and four white persons to the Board, was also employed in 1976, 1980 and 1984. JA 1450, 1805. When "various vacancies" occurred, including one in 1987, none was ever filled by a black citizen. JA 1450. As of trial, 3 of 13 members were black. PA 167a. The qualifications for the position do not explain the pattern of appointments. "The Governor shall appoint only men or women as such members as shall be qualified electors . . . at least twenty-five years of age, and of the highest order of intelligence, character, learning, and fitness for the performance of such duties. . . ." Miss. Con., Sec. 213-A. "There are no stated written criteria for selection of Board members. Those appointed to serve on the Board . . . have represented various professional backgrounds." PA 167a; JA 1440-41, 1803-04, 1806.

	Mississippi 1980 Census	
	W	B
Under age 16	55.6%	44.4%
Ages 16-21	58.7%	41.3%
Ages 22-24	63.3%	36.7%

The composition of Mississippi's *public school* population, by percentage, was (JA 668-69):

	1985-86			1986-87		
	W	B	Other	W	B	Other
Grade 12	54.4	45.1	.5	54.1	45.4	.5
All grades	48.6	50.9	.6	49.2	50.0	.8

Black enrollment in the system, especially at the graduate and professional levels, did not approach these population figures, and there is a pronounced disparity with respect to degrees received: [15]

	Proportion of Those Enrolled Who Were Black		Proportion of All Degrees Received by Black Persons
	1979-80	1985-86	Years Indicated
undergraduate	33.5	30.5	23.9 (1984-85)
graduate	28.5	20.7	20.6 (1984-85)
professional			
vet. medicine	3.4	1.8	no data
medical	—	5.4	4.5 (1982-86)
dental	—	4.8	4.4 (1982-86)
law	4.6	5.0	4.4 (1982-86)
	[USX 172-90,192a JA 624-25		[PPA 179-204; no MUW data USX 805; PX 329(3)]

Furthermore, in recent years black enrollment in the system has declined while other enrollment increased:

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[15] U.S. government data reveals that Mississippi's public school population was 50.2% black in 1972. U.S. Dept. of HEW, Office for Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts*, 745 (Fall 1972).

	1977-78	1979-80	1985-86	Change	
Undergraduate					
Black enrollment	15,043	14,391	12,980	−2,063	(13.7%)
Other enrollment	27,789	29,079	29,640	+1,851	(6.7%)
Graduate					
Black enrollment	2,013	1,855	1,455	−558	(27.7%)
Other enrollment	5,091	4,637	5,585	+494	(9.7%)
	[USX 172-90]	[USX 172-90]	[JA 624-25]		

As shown *infra*, these decreases followed two actions by the Board; *i.e.*, increasing minimum test score requirements at HBIs, and decreasing the number of applicants with ACT scores of 9 to 14 who could be accepted by HWIs. Moreover, the Board's changes eliminated from Mississippi's college-going population black persons who could have succeeded.[16]

2. *Enrollment Patterns*

In 1985-86, 99.32% of the system's white undergraduate students attended an HWI. PA 51a. In that year, 96.6% of white graduate students attended an HWI. JA 625. Black students were concentrated in HBIs, but to a lesser extent (*i.e.*, undergraduate level—70.3%, graduate level—63.7%). JA 624-25.

The proportion *by program level* of *black enrollment* in each school in 1979-80 and 1985-86 (USX 172-89, JA 624-25) was

		Undergraduate		Graduate	
		1979-80	1985-86	1979-80	1985-86
HBIs:	ASU	95.6	95.7	95.4	96.0
	JSU	94.8	91.9	85.4	59.0[17]
	MVSU	99.6	99.3	100.0	96.7
HWIs:	DSU	18.8	17.6	40.2	26.2
	MSU	11.2	11.3	9.8	7.6
	MUW	19.4	17.7	17.1	13.2
	UM	7.3	5.9	6.4	7.5
	USM	11.2	13.4	8.7	8.1

[16] This decrease is significant. See Bureau of the Census, *Educational Background and Economic Status: Spring 1987*, Series P-70, No. 21, at 8 (Oct. 1990) (average monthly income for black persons whose highest educational attainment is high school or bachelor's degree is, respectively, $877 and $1,596).

[17] This total is explained by the fact that "[i]n 1985-86, [JSU] enrolled 59% black, 13.3% white, and 27.7% other-race pupils." PA 51a, n.10.

3. *The Employment of Administrative Staff*

In 1983, nine years after the Plan of Compliance gave "particular emphasis" to increasing other race employment, including at the "managerial" level (JA 73), the placement of 501 of the 513 "administrators" (97.7%) mirrored historical racial designations. USX 811a-j. At HWIs, six of 393 administrators (1.5%) were black. *Id.* The proportion of black administrators at each institution was (*id.*)

HBIs		HWIs	
MVSU	92.5%	DSU	0.0%
JSU	94.1%	MUW	0.0%
ASU	96.7%	MSU	0.7%
		USM	2.0%
		UM	2.9%

In 1986, at the highest administrative levels, HWIs reported 22 officers, who were all white, despite turnover of 15 positions since 1981. JA 407, 410-14, 416-18; USX 763. HBIs had 9 black and one white officers. JA 406, 408-09, 415.

Only two black administrators have ever been employed at the highest levels of HWIs.[18]

The district court wrote that "plaintiffs point to alleged specific instances of discriminatory conduct directed towards black . . . staff . . ." (PA 198a), but did not discuss the testimony. This evidence, from five witnesses, to which the Board offered no specific rebuttal, revealed: (a) that three black faculty members applied unsuccessfully for a total of six administrative positions at MSU (JA 1495, 1501, 1558-59), which had 0.7% black administrators in 1983 (USX 811d); (b) that a black person,

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[18] These are a dean of the School of Social Work, USM (JA 1690), and, at UM, Dr. Lucious Williams, Assistant Vice Chancellor for Academic Affairs, the third ranking position in that division, one of four divisions. JA 882-84; JA 1880-81 (offer of proof). On three occasions, Dr. Williams received additional duties without a corresponding salary increase. JA 882-84. No black person served as an academic dean or department head at UM in the period 1975 to 1986. JA 882, 885-86. See also JA 1503 (MSU).

who as of the trial was Assistant to the President and Director of Minority Affairs, University of Akron (JA 1506), had left an administrative position at MSU after its president repeatedly assigned "very menial tasks" of a secretarial nature (JA 1517; see generally JA 1512-21)[19]; and (c) that a black administrator left UM in frustration after 10 months, when her request to adjust her position to meet needs which she had identified was ignored. JA 1468-74.

4. *The Employment of Faculty*

Although recognizing the connection between having black staff and successful black student recruitment,[20] the HWIs were also token employers of black faculty. In 1985-86, the five HWIs employed 2,563 faculty, of whom only 60 (2.3%) were black. PA 55a. Each HBI had, alone, more black faculty than the HWIs combined; *i.e.*, ASU (108), JSU (214; 3.6 times as many) and MVSU (83). JA 398-400. In 1985-86, the schools had the following percentages of *black* faculty (PA 56a):

HBIs		HWIs	
JSU	67.3%	UM	1.5%[21]
ASU	67.9%	MUW	1.9%
MVSU	73.5%	MSU	2.3%
		USM	2.4%
		DSU	5.0%

[19] The witness had a rich background, including receipt of degrees from three of the eight Mississippi universities, two HWIs (JA 1506-07); experience at the high school and junior college level in Mississippi (JA 1507-08, 1510-11); experience with issues of sex discrimination, affirmative action, and grant administration (JA 1508-11); receipt of many awards (JA 1512); and service as Assistant to the Vice President and Director of Minority Affairs, MSU, from 1979-85 (JA 1511).

[20] See JA 1707 (president of USM); USX 625, pp. 4-5 (chancellor of UM); see also recruitment brochures picturing black staff, *e.g.*, DX 134, p. 2; DX 151, p. 2; DX 143, p. 5; DX 151, p. 24. Black faculty at HWIs have typically endeavored to support black students. USX 625, p. 5 (chancellor of UM); Tr. 1406-09 (UM).

[21] As UM had only 10 black faculty members as of the trial (JA 1229), the district court's failure to mention the evidence concerning

The district court did not set forth the pattern of faculty allocation. PA 135a-136a. Its analysis (PA 198a-199a) did not account for HBI success, *in Mississippi*, in hiring black faculty.[22]

The 1974 Plan of Compliance addressed the increasing of black faculty at HWIs, projecting progress by 1980 well in excess of that attained by 1985-86. Compare JA 90 and JA 1226-30.[23] It proposed the recruitment and development for college faculty positions of promising undergraduate and graduate students. JA 74-75; PA 118a. It cited "a potential of 630 additional minority faculty" by 1980. JA 75; Tr. 1071-72. "The Board [proposed to] make a special request to the 1975 Mississippi Legislative Session for $345,000 to underwrite this program during the 1974-75 school year." *Id.* No funds were sought for any part of the plan until FY 1977; then, the legislature provided none! JA 896. Thereafter, the legislature provided only 40% of the funds sought by the

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three black faculty members who taught there and left is significant. See JA 1478-83 (M. Williams left after one year; had difficulty securing summer research grant which she had been promised; "supportive environment" evaporated after she pursued grant at a higher level); JA 1489-90 (E. Green left after one year as a visiting professor; very late offer of a position by persons who knew he had earlier accepted another position); JA 1880 (L. Redmond; left after grant which she sought for "several years" was received, but directorship was given to a white male, although she had been promised it) (offer of proof).

[22] The Board implemented for several years a "faculty clearinghouse" (JA 1446) under which HBIs were to provide "their excess or overflow of persons seeking faculty positions . . . ." JA 1448. While some institutions used it ("very sparingly"), it "did not work" "because it was contrary to the basic procedures used by department heads, faculty members, deans in recruiting faculty." JA 1446-47 (Board executive secretary Thrash). In addition, Dr. Lucious Williams maintained at UM "from about 1983 to 1985-86" a "*minority faculty vita bank*" with "about 200" vita on file on an annual basis. JA 884-85; JA 1881 (offer of proof). See PA 55a, n.16 (citing "vita bank").

[23] The plan accounted for the matters which the court found to excuse the Board's later performance. Compare PA 136a-38a and JA 73-74.

Board for the overall plan. *Id.*[24] The Board did not implement the faculty development provision, on the scale envisioned. Tr. 1074; JA 1472, 1704-07. The court cited the provision, but not the failure to implement it (PA 118a), although it emphasized the scarcity of black faculty candidates. PA 136a-37a.

5. *Admission Standards Include a Testing Requirement Adopted with Discriminatory Intent and Otherwise Operate to Maintain a Racially Separate and Unequal System*

It is undisputed that in the early 1960's Mississippi's black students were confined to universities which had been provided, discriminatorily, lesser resources. In 1961, when the Board considered establishing a test requirement for admission to all schools (PA 120a), it certainly knew that black students would score far lower.[25] The Board faced the question of leaving in place standards which would provide black citizens' broad access to *desegregated education* in *HWIs having superior resources*, or adopting new standards perpetuating the status quo. The Board not only adopted in 1961 a discriminatory testing requirement for admission, it, thereafter, selected among alternatives those more consistent with subjecting black persons to perpetuation of segregation, *and* lack of access to better resources. See, *e.g.*, JA 1391 (large disparity, favoring whites, in weighted average expenditures in 1986). Furthermore, the Board's more recent actions have drastically reduced the black enrollment (*e.g.*, undergraduate population fell by 13.7% from 1977-1986). See p. 10, *supra*.

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[24] See Tr. 4366-67 (cuts in compliance funds hurt JSU's ability to recruit white staff and students).

[25] In 1954, the defendant Board reported that in elementary and secondary education the state provided lesser resources for black pupils than it did for white pupils. JA 815.

a. *The Board Adopted and Maintained An Intentionally Discriminatory Testing Requirement for Admission to The Universities*

In 1961, "[s]everal days" after James Meredith applied to UM, the Board adopted a "new policy" requiring that all applicants to the eight universities "take a test or tests prepared by the American College Testing Program (ACT)." Within months, the Board authorized each institution "to set a minimum [ACT] score . . ." for admission. PA 120a. By 1963, MSU, UM and USM required minimum scores for regular admission which few black persons could satisfy.[26] The district court found that the Board's adoption of the ACT in 1962 [should be 1961], which included authorizing minimum scores for admission, was "because of . . . its adverse effects upon [black persons]." PA 179a.[27]

Thirteen years later, the Board adopted a policy to be effective in the Fall of 1977. PA 123a.

> [It] stipulated that no student was to be admitted to any institution as a first-time freshman who failed to achieve an ACT score of 9 [and] that those institutions presently requiring higher minimum ACT

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[26] "In 1963, [MSU], [UM], and [USM] enacted policies requiring all freshman applicants to achieve a minimum composite ACT score of 15 . . . . [MSU] and [USM] did not admit their first black pupils until 1965 and 1967 respectively." PA 121a. "At the time, the average ACT score for white Mississippi students was 18 while the average for black Mississippi students was 7." PA 51a-52a. DSU adopted a minimum score of 15 in 1966. Tr. 3507-08.

[27] The "minimum [ACT] score" was drawn from the "ACT assessment," which consists of four tests in the areas of English usage, mathematics, social studies reading, and natural sciences reading, as well as a set of information about a student, including his/her self-report of high school grades in the four areas tested. A student receives a score in each of the four areas and a "composite" score, an average of the four area scores. Each score may range from 1 to 36. ACT has long accepted the reliability of self-reported grades. JA 836-38; JA 1777. The test reflects "present educational development," "not . . . innate ability or potential . . . ." PA 129a.

scores were to continue those requirements. *Ayers I*, PA 123a.

In brief, the Board established minimum score requirements directly—*in part by continuing the HWI scores above the minimum*, originally adopted by express authorization from the Board close in time to the action held to be intentionally discriminatory. However, the lower courts treated the 1976 Board action as wholly separate from the 1961 actions—and nondiscriminatory. PA 179a; 32a-33a.[28]

In 1977 and later years, the *minimum score requirements "continue[d]" at HWIs* were ones which highly disproportionate numbers of black youth could not satisfy. For example, in 1985-86, approximately 7 of 10 white high school graduates, but only 3 of 10 black graduates, secured ACT scores of 15 or higher, required for regular admission to four HWIs. JA 640-43, 645-48. Furthermore, in a 1986-87 survey, the eight institutions identified the following "[n]umber[s] of [in state] applicants rejected because ACT/SAT score below minimum": *HBIs*—ASU (529); JSU (668); MVSU (381); *HWIs*—DSU (68); MSU (56); MUW (7); UM (23); USM (135). See PX 300(a)-(h).

b. *Faced with Alternatives, the Board Opted for a More Racially Exclusionary Method for Using ACT Scores*

As the district court found (PA 178a-79a; see also PA 33a), ACT publications recommend use in admission decisions of *the four area test scores, combined with the high school grades* from the "ACT assessment" (n. 27, *supra*), on the ground "that test scores and high school

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[28] The impact of the use of a discriminatory test requirement did not end in 1977, in any event, shaping, discriminatorily, additional affiliations with schools. Parents' university connection is an important factor in the choices of their children. See Tr. 598 ("Family background, history"); Tr. 3087 (". . . and the alumni relationships that result in desire on the part of parents to send their children to that institution so that they might also benefit from the experience that had served the parents well").

grades combined are a better predictor of college grades than either alone." JA 837; USX 346, pp. 146-47 (1973 "Technical Report").[29] In contrast, the Board has required use of only the *single "composite" score* in regular admission decisions. PA 121a (". . . minimum composite ACT score . . .") ; see also JA 1186-87.

ACT's publications, including its "policies" "for responsible uses of test scores," have always expressed opposition to eliminating a student from the regular admission pool based solely upon an ACT score. JA 1152.[30] See also, *e.g.*, JA 1528-30 (Plaintiffs' expert) ; JA 1772-73, 1777, 1791-92, 1795-96, Tr. 3805-06 (Board expert) ; JA 833-34, 836-37. And the great majority of institutions do not employ such minimum scores.[31] With regard to

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[29] The technical report noted that "the high school record is a summary of the academic work performed over a period of several years while a test involves 3 to 4 hours of performance in a test situation." JA 193. ACT continued: *"it would be foolish* to abandon [use of information on grades] . . . ." *Id.*, emphasis added.

[30] At least two reasons underlie ACT's position. First. ACT candidly confesses in its technical manual that even when grades and the four test scores are used "the[se] predictors still account for only a modest portion of the variation which occurs in the criterion [*i.e.*, explain "only a modest portion" of the differences in the grade point averages of those students admitted]." JA 194, explanation added. See also JA 1798-1800 (testimony of ACT employee at trial). Using even less information (*i.e.*, one composite score), will mean that even more applicants will be erroneously identified as unable to succeed, as measured by freshman GPA. JA 1531-32. Second. Many persons with lower test scores can succeed if supported by "compensatory instruction [and] counseling . . ." See OCR criteria, PPA 94 (para. II, H.). The Board's executive director reported that retention rates in the system of students needing "developmental courses" "[were] in line with retention rates for all first-time entering freshman over a comparable time." JA 829.

[31] The Board's "mid-70's" review of admission standards (PA 122a) included the gathering of data on practices in 15 southern and border states. All 15 used "Standardized Test Scores"; however, the Board's staff reported, "[n]one . . . use[d] test scores alone for the admission decision." JA 182. Roughly, two-thirds of institutions of higher education do not use cutoff scores. JA 1797-98. The medical and dental schools of UMMC do not use cutoff scores. JA 1111-1112.

minority applicants in particular, ACT has counselled against using the composite score as the Board has. JA 1209-10.[32]

In essence, the district court found that ACT considered alternative uses of the test to be acceptable. Compare PA 178a (ACT "recommends . . .") and PA 34a, with PA 180a (ACT informed Board that "the use of the Act test score alone was *also* a valid indicator . . .") (emphasis added). The record reveals that including use of grades in the regular admission process—the method supported in ACT publications—would be more racially inclusive. This is the case because the disparity between the grades of white and black youth is smaller than in their test scores. See JA 1525-27, 1785; PX 350, 3/18/87, pp. 70-72.[33]

In 1985-86, 72.2% of the white high school graduates and 29.7% of black graduates scored 15 or higher on the ACT, the cutoff score for regular freshman admission at four HWIs (DSU, MSU, UM and USM). JA 127a, PPA 138-139; JA 640-43, 645-48. In that year, 52.5% of white high school graduates and 15.3% of black graduates attained a score of 18 or higher, the cutoff score for regular admission at MUW as of Fall, 1987. JA 640-43, 645-48. Also in 1985-86, 43.8 percent of white high school graduates and 30.5 percent of black graduates had grade point averages of 3.0 or better. PA 140, 144; JA 639-48. Thus, the proportion of whites with test scores of 15 or

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[32] See also Tr. 1375-76, 1378 (testimony of current professional-level employee at Lincoln University that she had received a "9" on ACT).

[33] The district court found "adequate justification" for the Board's non-use of grades based upon concern about grade inflation, as well as variation in grading practices and course offerings. PA 180a. However, ACT had long found, using *national data*, better prediction by combining grades and test scores (JA 837; USX 346, pp. 146-47) and *Mississippi data* yielded the same result. See USX 903 at "page 1.00" for 6 institutions ("TH INDEX" is highest in every case). In addition, the Board allowed use of grades in several instances, as the district court's findings show. PA 128a [Board approved use of high school grade point average in admission decisions by MUW and JSU (also class rank at JSU)]. See also JA 404. (MVSU had same policy as JSU as of February, 1986).

higher exceeded that figure for blacks by 2.4 times, while the corresponding excess for grade point average was 1.4 times.[34]

c. *The Board's Test Score Requirements for Admission Have Operated to Maintain a Racially Separate and Unequal System*

i. **The Minimum Test Score Requirements Have Uniformly Been Higher at the Historically White Institutions (HWIs)**

As noted, in 1963 MSU, UM and USM required "freshman applicants to achieve a minimum composite ACT score of 15." In 1966, DSU adopted the same minimum composite score. Tr. 3507-08. The three HBI's "did not require a minimum score for admission". PA 122a.

For 1977, the Board established, directly, an ACT composite score of 9 as a floor for all institutions, requiring that higher minima be "continue[d]." PA 123a. The HBIs then established, with Board approval, minimum requirements. Thereafter, the *uniform pattern* of all HBIs having lower minimum requirements than all HWIs continued. As of trial, the minimum score requirement for regular admission as a freshman to each HBI was 13. PA 128a. In contrast, it was 15 for four HWIs (DSU, MSU, UM and USM) and 18 for MUW (as of fall 1987). PA 127a.

As shown above (n.26 and p. 18), it has always been the case that a far smaller proportion of black youth could satisfy the uniformly higher minimum score requirements of the HWIs.

ii. **Exceptions to the Minimum Score Requirements Have Been More Generous at the Historically Black Institutions (HBIs)**

Beginning in December 1977, the defendant Board authorized each school to admit "under a 'special talents'

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[34] In the mid-1970's four HWIs admitted students with ACT scores of 12-14 (DSU, USM) or 13-14 (MSU, UM) in the summer on probation. USX 57; 351. The Board first placed a numerical limitation on these provisions (JA 170), and then eliminated them. JA 171-172.

or 'high risk' category" "some students" scoring below the institution's minimum score, but at least "nine." PA 124a.[35] These exceptions have also been, *uniformly*, more expansive at HBIs than HWIs. PA 127a-28.[36] For example in 1984-85, relatively small ASU could admit from 114 to 164 more students on an exceptional basis, than MSU, UM or USM. JA 831.

The Board's minimum ACT scores and exceptions identified the HBIs as the principal place for students with low test scores.[37] These students were disproportionately black, the group attending the HBIs before disestablishment began.

The district court viewed the exceptions as providing "substantial flexibility." PA 128. The court wholly ignored three factors. First. Their use was not required (JA 405); and MUW did not use its exceptions from 1982-83 to 1986-87. JA 1167. Second. There was massive evidence, drawn upon by the dissenters (PA 52a, n.12), that the other four HWIs, including in their recruitment brochures, publicized the requirement of an

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[35] This was not a "liberaliz[ation]" (PA 124a); the HWIs admitted more students with ACT scores of 9 to 14 in 1976-77 than they could after the December 1977 actions. Compare USX 327, pp. 4, 6-7, 9-10 (866 admitted) and JA 831 (457 positions).

[36] As of trial, DSU, MSU, UM and USM could "enroll on an exceptional basis a number [of students with ACT composite scores of 9-14] not to exceed *5%* of the previous academic year's *freshman class* enrollment or 50 students (whichever is greater) . . . ." PA 127a; explanation and emphasis added. ASU and MVSU, smaller institutions, could make exceptions, for students with composite scores of 9-12, up "to a number equivalent to *10%* of the previous year's *fall term enrollment*." PA 128a; emphasis added. JSU could use a base of *8%* of *freshman class* enrollment to make exceptions to its minimum score of 13. *Id.* JSU could also admit students with scores of 9-12 and high school grade point averages of B or better, or a class rank of 50% or higher, without counting them against the 8% exceptional allowance. *Id.*

[37] See JA 1658-59 (Board expert Millet agreeing with "characterization of the Board admissions standards that they have reflected that one mission of the system of higher education is to give access to students who are less well prepared, but have—Place [sic] that mission primarily at the [HBIs].").

ACT score of 15, but not the exceptions.[38] Third. In 1985-86, 2470 black and 2764 white high school graduates had ACT scores of from 9 to 14. JA 639-40, 645. However, in 1984-85, the last year for which data was available at the trial, the total number of positions for high risk and talented students at the five HWIs (including MUW) was only 457. JA 831; PPA 106.[39]

d. *The Board Eliminated from the System Large Numbers of Black Persons Who Could Have Succeeded*

Black undergraduate enrollment declined by 2,063 from 1977-78 to 1985-86. See p. 10, *supra*. These decreases followed the raising of minimum ACT score requirements at ASU, JSU, and MVSU,[40] and the reducing of HWI capacity to accept students with ACT scores of 9 to 14. See n. 35, *supra*. Black undergraduate enrollment in the HBIs totalled 11,493 in the years preceding initial test score changes and 9,125 in 1985-86.[41]

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[38] See, *e.g.*, DSU: JA 423-24 (catalogue); JA 995 (brochure); JA 808-09 (recruitment meetings); *MSU*: JA 1007 (brochure); *UM*: JA 1020, JA 1047; JA 1109 (brochures); *USM*: A 1121-22 (brochure); JA 1697-1700 (catalogue provision unclear and incorrect); see also JA 1699 (president of USM; "Let me make it clear that we do not encourage students with less than 15 to come to [USM] . . .").

[39] In the years 1983-84 to 1986-87, the HBIs admitted 4,726 youth with ACT scores of 9-14 and the HWIs only 1,177. JA 1159, 1161, 1163, 1167, 1169, 1171, 1173.

[40] The changes were as follows: *ASU*—from 9 to 11 for 1978-79 and to 13 for 1979-80 (PA 123a, USX 54, exh. B); *JSU*—from 9 to 10 for 1980-81 and to 11 for 1982-83, (USX 912, S.126, attach.; USX 744(b), pp. 20-21); *MVSU*—from 9 to 10 for 1980-81. USX 912, S.126, Attach. 126. Moreover, additional increases in ACT minimum scores at JSU and MVSU were effective in 1986-87. PA 125a.

[41] The enrollment changes were as follows: *ASU*—2507 (1977-78) to 2191 (1985-86) USX 172, JA 624; *JSU*—6323 (1979-80) to 4845 (1985-86), USX 174, JA 624; *MVSU*—2663 (1979-80) to 2089 (1985-86), USX 177, JA 624. There was some increase in black enrollment at HWIs, *e.g.*, an increase of 545 students from 1977-78 to 1985-86. USX 172-180, JA 624.

The decreases could come as no surprise to the Board. In a letter to its members and the executive director on December 18, 1978, Dr. John A. Peoples, Jr., JSU President, warned that "the proposal . . . to raise the minimum entrance score on the American College Test" "would radically decrease the black student enrollment in our Mississippi universities. . . ." USX 948, Exh. 66, p. 1.

The Board collected data showing by ACT score level the proportion of entering freshmen who received passing grades. It revealed, generally, that a majority of students with ACT scores of 9 to 12 had been able to secure passing grades at the HBIs.[42]

6. *Black Students at UM Have Been Subjected to Discrimination and Harassment*

UM had the lowest black enrollment of any HWI in 1985-86 (5.9% black undergraduates, 7.5% black graduate students).[43] The district court found a lack of "statistical parity" between the low freshmen enrollment at UM and "the representation of blacks in the qualified pools." PA 186a.[44] The expert whose analysis the court cited agreed that black citizens were "uncomfortable" regarding application to UM. JA 1867-68.[45] Extensive evidence of discriminatory state action at UM explained the

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[42] The data reveals the following proportions of passing grades: *ASU* 1979-80, 126 of 293 (43%) (USX 329a, last page); 1985-86, 194 of 343 (56.6%) (JA 665); *JSU* 1979-80, 605 of 1020 (59.3%) (USX 329c, p. 55); 1984-85, 252 of 507 (49.7%) (JA 655); *MVSU* 1979-80, 297 of 425 (69.9%) (PX 86); 1984-85, 228 of 343 (66.5%) (JA 665). Thus, 1702 of the total group of 2931 (58.1%) earned passing grades. See also JA 1463-64.

[43] MSU had the next lowest totals, *i.e.*, 11.3% black at undergraduate level, 7.6% black at graduate level. JA 624-25.

[44] The court described the evidence as showing such "parity" for the other HWIs. There was, in fact, the same lack of parity for MSU in the most recent year analyzed. JA 1865-66.

[45] Board expert Dr. Bernard Siskin also testified "that there is something in the process in Blacks in the qualified pool being less likely to attend and showing up at University of Mississippi than Whites in the qualified pool." JA 1857; also Tr. 4221.

sources of discomfort and the resulting low black enrollment.[46]

The evidence established the following practices:[47]

- verbal harassment of black students by faculty, for example by racial slurs and denigrating blacks as a people;[48]
- discrimination in the availability of a variety of programs and services;[49]
- unfair grading of black students;[50]
- inaction by the UM police;[51] and
- inaction by the UM chancellor *re* safety issues.[52]

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[46] The district court's finding of "no evidence" relating UM make-up "to official discriminatory policies or practices" (JA 186a) is based upon legal error. See pp. 60-61, *infra*.

[47] Six former black students of UM testified about some part of the period from 1975 to date. One of these witnesses also testified about the late 1960's. All citations are to the more recent period, except the five marked with an asterisk(*).

[48] See JA 1592 ("I guess we can start, the 'nigger' has arrived"); JA 1606-09 (black students singled out for criticism in front of other persons); see also Tr. 2663; JA 1590-92, 1605-06, 1610-11, 1620-22.

[49] See JA 1591-92 (difficulty convening Ph.D. Committee); JA 1574-75, 1577-78 (less advantageous funding); JA 1578-79* (told couldn't be math major); JA 1582-83* (inadequate counselling); JA 1579-80* (off. of proof) (barber shop wouldn't serve blacks); 2683-86 (employment placement system favored whites); JA 1609-11, 1613 (clinical and written assignments favored whites); JA 1610-13 (smaller fellowship grants than white students); JA 1632-33, 1641 (unsuccessful efforts to secure space for black fraternity on "fraternity row").

[50] See JA 1587-88 ("F" on paper on school integration, instructor commenting that "automatically I got a D when she read my topic . . ." and that "Black people have an inherent problem in mastering the English language"); JA 1591 ("I do know that black folks don't write that well . . ."); see also JA 1586-87, 1605-06, 1614, 1615-17, 1620-22; Tr. 2731-36, 2796-97.

[51] See JA 1623-24 ("I got slapped in the face with a confederate flag. University police department were standing on the corner and people were driving by in red convertibles yelling, 'Nigger, nigger,' and they could see that I was being harassed, but they didn't come over to stop it."); see also JA 1579-81* (off. of pr.); 1623-25, 1539-40.

[52] See JA 1627, 1639-40.

Upon being elected as the first black cheerleader at UM, John Hawkins (1980-84) stated that he wouldn't carry the "rebel flag". JA 1635-37. Extreme harassment followed. On one occasion a huge mob of whites gathered at his fraternity house, screaming racial epithets. JA 1637-38; see also JA 1623-27. Other continuing harassment included: death threats by mail and telephone (JA 1638-40); vandalizing of his dormitory room (JA 1638-39); and being pelted with objects like a golf ball and a whiskey bottle while cheerleading. JA 1640. Mr. Hawkins' efforts to secure protection were unavailing. JA 1639-40. Unfortunately, Hawkins' experiences were typical, especially for black student leaders. See JA 1579-81* (off. of proof), 1596-97, 1622-23, 1642-43. There was also testimony of raically offensive articles in the campus newspaper, the *Daily Mississippian*. JA 1473, 1490-91, 1630-32.[53]

The evidence confirmed the relationship of the low black enrollment at UM to the ongoing harassment. A Board expert agreed that "harmony on the campus for black students who were at [an HWI] [was] important in terms of that institution's ability in the future to increase its percentage of black students." JA 1659. Pam Gordon, a black student enrolled at MVSU, provided an individual perspective. Ms. Gordon graduated from Oxford High School (UM is at Oxford) with a "B" average and an ACT score of 20. MVSU and JSU, but not UM or other HWIs, recruited her. She decided against attending UM "because of the reputation of it being unfair to black students. . . ." She referred specifically to

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[53] The testimony of Eric Green, a black visiting professor at UM for one year, buttressed the students' testimony. Green was chastised when he proposed a course on "Sex and Racism" (JA 1485); and received a negative reaction when he sought to include mention of James Meredith in an event to commemorate the twentieth anniversary of the start of desegregation (JA 1486-87). When Green sought an increase in the number of courses "germane to black studies," "[o]ne or two of the chairpeople were encouraging, but for the most part, there was polite to negative response." JA 1488-89.

the "incident [involving] . . . the black cheerleader . . ." and "the Klan march." JA 1572.

7. *The Board Has Maintained Competing Branch Centers of HWIs Near HBIs*

The district court found that "racially segregative policies" as of 1962 included "maintenance of branch centers by the [HWIs] in close proximity to the [HBIs] . . ." (PA 169a), "providing a way for whites" to attend an HWI rather than an HBI. See USX 943, pp. 55-56. These were the Universities Center at Jackson in which UM, MSU and USM competed with JSU; and the Natchez and Vicksburg centers in which USM competed with ASU. PA 146a-50a.

At the time of its negotiation with HEW concerning compliance with Title VI of the Civil Rights Act of 1964 (JA 78-79), and *after this litigation began*, the Board enhanced the roles of JSU and ASU in the competing center(s). PA 119a, 148a-50a.[54] The court found that: (a) the centers remain open with management shared by an HBI and one or more HWIs, (b) their present offerings and enrollments are limited, and (c) "[a]t present, [JSU] enjoys on-campus privileges at the University Center and retains veto authority over all programs offered at the Center by the remaining institutions." PA 148a-50a. In the past, the Board, rather than JSU, controlled course offerings at the Universities Center. JA 115-16, 117-18, 145; USX 943, pp. 62-63, 65-66. After the district court's decision, however, the Board withdrew JSU's "veto authority" over HWI offerings at the Center.[55]

The committee that drafted the "Plan of Compliance" "recommend[ed] that the University Center be turned

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[54] A letter from the Board's Executive Director to his Tennessee counterpart recognized the Board's vulnerability on the issue, concluding, after requesting information, "If the above request is too confidential, I will understand and wish for you the best of luck." JA 183.

[55] See Reply Brief of Private Petitioners in support of this petition, March 1991, pages A. 10-11.

over to [JSU] . . ." (USX 943, p. 53), a proposal rejected by the Board. Dr. John A. Peoples, Jr., then President of JSU, supported a transfer because the center "was established to provide a way for whites to go to school in Jackson without going to [JSU]" (*id.* at 56); and, the center "in Jackson kept [JSU] from being able to integrate its student body because of the competition of the courses being offered by Ole Miss, State and Southern" (*id.* at 54). He thus requested that the plan purpose "that [the] center either be made a part of [JSU] or eliminated." *Id.* The issue persists today.

8. *Mississippi's HBI's Have Played a Vital Role in the Education of the State's Black Citizens*

Mississippi officials admittedly afforded narrower educational opportunities for black citizens. When a single black citizen sought admission to UM, the Board adopted an admission standard designed to exclude black persons from its HWIs. The Board thereafter implemented admission criteria and other practices identifying HBIs as the principal vehicle for educating black citizens. In addition, state action continued to render the environment for Afro-Americans hostile at UM, the state's first and one of its largest universities.

Faced with this pattern of continuing default, the HBIs assumed well the role of providing higher education for black persons. In 1985-86, 70.3% of the black undergraduate students in the system attended an HBI (JA 624; PPA 137); the comparable figure for graduate students that year was 63.7% (JA 625; PPA 137). The pattern for degrees was similar. In 1984-85, of degrees earned by black persons, the HBIs awarded 68.0% (undergraduate) and 62.5% (graduate). PX 329(3), (4); USX 805. The dramatic nature of these statistics is heightened, when it is noted that the HBIs are but 3 of 8 schools, smaller overall, and, at the graduate level, have fewer programs due to discrimination.[56]

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[56] Dr. Robert Young, an MVSU graduate and professor there, testified vividly to its role in improving the quality of life in the

9. *Programs Have Been Placed and Maintained on a Racially Discriminatory Basis Denying Equal Opportunity to Black Citizens and Diminishing the Ability of HBIs to Attract White Persons*

a. *The Continuing Racial Disparities in the Allocation of Programs and the Failure to Implement the Plan of Compliance*

The Board's past provision of less extensive educational opportunities to black citizens at the HBIs is unchallenged. The *en banc* majority, rejecting a district court finding, concluded that "disparities among the institutions" persisted to the time of trial (PA 36a-37a):

> The district court incorrectly concluded that the disparities among the institutions were not reminiscent of the former de jure segregated system. (PA 191a.) On the contrary, the disparities are very much reminiscent of the prior system. . . .

The evidence clearly depicted these disparities, the limited efforts to change them, and, most importantly, their impact on educational quality (see part 9.b.).

The Board's 1974 compliance plan listed the programs available as of 1973-74. JA 52-53.

Mississippi delta. Tr. 1224, 1225, 1244-56. MVSU opened in 1950, in an area where many black residents were "descendents of former slaves and . . . most of them had little or no education, formal education whatsoever." JA 1456-57. MVSU provided public school teachers and administrators, willing to remain in the area, much enhancing the educational level of the delta citizenry. JA 1457-58. It favorably impacted early childhood education, and other social services, by educating the majority of directors, board members, teachers, and workers of Headstart and other agencies. JA 1455-56, 1458. The leaders of adult literacy and education programs have "primarily" been Valley graduates as have "many" of the black persons elected to office. JA 1460-61. MVSU provides programs for non-traditional students, and those seeking a high school equivalency degree, and technical assistance to small land owners and business people. JA 1455-56.

	Baccalaureate	Masters	Specialist	Doctoral	Other	Total Programs
HWIs						
UM	62	45	7	28	0	142
MSU	94	68	18	45	0	225
USM	108	73	27	37	0	245
MUW	37	14	9	0	1	61
DSU	34	13	4	0	0	51
HBIs						
ASU	28	0	0	0	0	28
JSU	38	23	1	0	0	62
MVSU	26	0	0	0	1	27

Thus, the three largest institutions were HWIs—UM, MSU, and USM—with programs exceeding the largest HBI (JSU) by 2.4, 3.6 and 4.1 times; only 24 of 388 graduate programs (6.2%) were offered at HBIs, with all 110 doctoral programs at HWIs; and only ASU and MVSU were limited to undergraduate programs.

The 1974 Plan of Compliance "stressed the importance of desirable programs in attracting students to universities . . . and promised priority [to the HBIs] for new programs." PA 118a-19a. As of 1986, however, "the disparities [continued to be]] very much reminiscent of the prior system . . ." —as the *en banc* court found. The schools ranked as follows with respect to total programs. JA 336-337.

MSU	151	DSU	57
UM	138	ASU	39[HBI]
USM	124	MUW	27
JSU	73[HBI]	MVSU	17[HBI]

Thus, the three largest HWIs had from 1.7 to 2.1 times the number of programs as JSU, despite that school's growth (PA 139a).[57] In addition, only 1 of 57 doctoral programs (1.8%) and 14.6 percent of all graduate pro-

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[57] See JA 1680, 1701-04 (inability of Board witness, employed in system for 30 years, since 1971 as a university president, to provide neutral explanation of pattern of program allocation).

grams were at HBIs (JA 337);[58] and instead of being "strengthened," MVSU lost 10 programs (JA 336).[59]

Despite the provisions of the Plan of Compliance promising "priority" to HBIs, the Board's evidence revealed that in the period 1976 to 1986 the number of new programs approved by the Board for the eight institutions was (JA 1739-41, 1248-52).

MSU	22	UM	14
MUW	17	MVSU	6[HBI]
USM	16	ASU	2[HBI]
JSU [HBI] and DSU	15		

The Board attributed the pattern to "institutions initiat[ing] those requests" (JA 1740-41), eschewing its affirmative obligation, although it controlled the matter. USX 636, p. 4, #10, p. 6, #16.

"No [HBI] [in 1981 or 1986] offers a professional degree in programs such as law, medicine, dentistry, or pharmacy." PA 140a. The Board did not transfer doctoral or other programs from HWIs to the campuses of HBIs to equalize educational opportunity and enhance the attractiveness of HBIs to white students. JA 1451, 1747-48.[60] The U.S. expert on programs testified, without contradiction, "that there simply are not a good many unique high demand programs that are offered in [HBIs]" and "there are fewer in 1986 than there were in 1981." JA 1330; see generally JA 1325-30 and JA 333-35.

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[58] JSU, which had the lone HBI doctoral program, had sought, unsuccessfully, six others. JA 731.

[59] The U.S. expert on programs testified to having, preliminarily, "some very genuine concerns about [MVSU's] ability to provide basic undergraduate education. . . ." JA 1331-32. The "number of programs" at MVSU and "the perception of [their] quality" were a "problem" in trying to recruit white students to attend the school. JA 1505-06. At one point, the Board proposed that MVSU have 1 program! Tr. 1688-89.

[60] Administration of the off-campus nursing program at Natchez was transferred from USM to ASU. JA 1451. The Plan of Compliance, which stressed programs (PA 118a-19a), had included the "reallocation of existing programs" as a technique to be utilized. JA 78.

b. *Comparative Analyses of Program Quality Show the Advantages of the HWIs (and Their Students)*

Paralleling the Board's 1954 comparison of the educational opportunities in HBIs and HWIs overall (PA 115a, n.2), Dr. Clifton Conrad, expert in "academic programs" for the U.S., made group comparisons of the HBIs and HWIs, in 1986, on eight indicators . . . [of] program quality" recognized in his field. JA 1324-24; see also JA 1321; 1315-16.[61] This analysis revealed the HWIs as a group to be superior on each indicator (see USX 685h-n), as had been the case in 1981 in a four-factor analysis. See JA 253, 255, 256. Dr. Conrad testified that the HWIs were of higher quality as a group in terms of the indicia of program quality in 1955, 1966, 1974, 1981, and 1986. (JA 1311-14, 1319-24). See also PA 61a (dissenting opinion).

Recognizing that students choose among universities, Dr. Conrad also compared on the eight factors, in 1986, six sets of one HWI and one HBI. JA 1307-09.[62] These analyses found HWIs to be superior in 46 of 48 comparisons, with one tie. See JA 311, 312, 314, 317, 1322.

Unrebutted evidence at trial also showed that faculty at HWIs are on an average paid more, more likely to hold higher academic ranks, more likely to be tenured, and

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[61] The eight factors are "the number, level and range of the program offerings", "professional accreditation" (JA 1316), "the number of book volumes in libraries" "percent of faculty with their doctorate," "percent of faculty with their highest degree from a research university one," and "ACT test score of entering freshman." JA 1321. Dr. Conrad had employed the first four of these indicators in a group comparison of the HBIs and HWIs in 1981. JA 1315-21.

[62] The comparisons were made between (1-3) JSU and MSU, UM and USM, (4-5) ASU and USM and MSU, and (6) DSU and MVSU. JA 279-82. The "major criterion" utilized in selecting pairs was "overlapping service areas." JA 1308-09; JA 280. Other factors were (a) comparing JSU "the most comprehensive of the three [HBIs] with the major [HWIs]" (JA 1309-10, USX 685, p. iii), (b) comparing geographically proximate schools (DSU/MVSU, ASU/USM) (Tr. 84, JA 280), and (c) comparing the two "land grant" institutions (ASU/MSU). JA 1308-09, JA 281.

more likely to hold the PhD or the highest degree in their field. JA 1384, 371-81. See PX 200, pp. 142-43, 148, 293 (same pattern earlier).

c. *Racial Disparities in the Land Grant Program*

ASU and MSU are Mississippi's "land grant" institutions. PA 150a. Such institutions provide "instruction in agriculture and mechanical arts, research in agriculture through . . . experimental stations, and extension of knowledge to farmers through cooperative extension programs." PA 151a.[63] The district court found that MSU's programs "are vastly superior to those afforded [ASU's] students . . .," with "for example, [a] greater breadth of course offerings and research opportunities. . . ." PA 197a.[64] Comparisons of the two programs reveal (JA 394):

	Programs Offered Teaching					Land/	
	BA	M.Ed.	Ph.D.	Faculty	Buildings	Acres	Enrollment
1981							
MSU	47	14	8	259	422	25,319	1846
ASU	7	5	0	23	13	1,365	196
1986							
MSU	39	22	15	357	422	unknown	1198
ASU	7	2	0	19	16	1,365	200

Although Mississippi's historic provision of narrower programs at HBIs was acknowledged, and MSU's land grant programs were "vastly superior," the district court addressed intent and found "the differentiations made . . . with respect to the nature of the land grant programs offered at the two schools [to be] educationally sound and . . . not motivated by discriminatory motive." PA 198a.

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[63] The program emerged, historically, from the interaction of federal laws enacted in 1862, 1887, 1890, and 1914, and corresponding state responses. PA 150a-52a (identifying and describing laws).

[64] The research and extension aspects of the land grant program, as well as the instructional element, contribute to the educational program, in part by strengthening the faculty. See JA 1409-10, 1418-19, 1421-24.

It is difficult to conceive of a present disparity more clearly the product of a history of racial discrimination.[65]

10. *The Board Continues to Provide Greater Funding to White Students*

As of 1962 the Board's "racially segregative policies . . . encompassed the [area] of . . . allocation of financial resources . . . ." PA 169a. Dr. Larry Leslie, the U.S. expert on funding, analyzed "the financing of . . . black versus . . . white students, regardless of where the students were enrolled," based upon a weighted average approach. JA 1389-90. This analysis showed that in 1968, 1980, and 1986, expenditures for white students exceeded those for blacks, per student, by $777, $774, and $1840, respectively. JA 1390-91; USX 694r, pp. 2-4.[66]

An analysis of average total education and general expenditures per student revealed (Tr. 557-58, JA 339, 349, 350):

Average For	1960	1980	1986
5 HWIs	$1,351	$5,412	$8,516
3 HBIs	$ 718	$4,310	$6,088

[65] Federal enactments of 1887 and 1914 offered funding for research and extension activities, respectively, encouraging or authorizing funding of more than one land grant program. See 24 Stat. 440, § 1; 38 Stat. 372, § 1. The Mississippi legislature designated MSU, which black persons could not attend, to receive all federal funds under each program (JA 396-97), which it did until 1966 (research funds) and 1971 (extension funds). See JA 386-88; USX 695h, p. 29. MSU received all state research funds until 1972 (JA 386-88), and all state extension funds until 1981. See JA 389-91. In the years designated, MSU's "share" of the various funds was *federal research* (1980) (77%); *state research* (1986) (98.7%); *federal extension* (1981) (91.3%); and *state extension* (1986) (99.22%). See JA 386-88; JA 389-91, JA 392-93. MSU's greater visibility also allowed it to secure "other" funds and special projects. Tr. 69-71; JA 1425-28; JA 1431; JA 386 ("other" income).

[66] Dr. Leslie's approach focused on *all* black (and *all* white students) in the entire system, rather than only the black students at HWIs, a matter found to be "influential" by the district court. PA 196a-197a.

The district court agreed that "differences in level of funding obviously exist. . . ." PA 196a. However, it found this pattern to be traceable to "differ[ences] between the comprehensive and noncomprehensive institutions," to be expected "[i]f one follows mission precepts . . ." (*id.*),[67] and, therefore, to be "explained by legitimate educational distinctions among institutions." *Id.*

Other findings and evidence shed light on the court's explanation of the funding disparities. First, neither "comprehensive" status, nor "mission" designation was a neutral category. The district court found that the Board had favored HWIs in resource allocation (PA 169a); and the *en banc* majority concluded that as of trial "the disparities among the institutions" "[were] very much reminiscent of the prior system." PA 136a. The central factor in designating MSU, UM and USM "comprehensive" in the 1981 Mission Statement was there then-existing status. See p. 41, *infra*. The *en banc* court found that the 1981 mission designations locked in the lesser status of the HBIs. PA 31a.[68] Second, a series of policies and practices had promoted the attendance of black students at HBIs, rather than comprehensive universities with higher expenditures.[69]

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[67] "*Mission*" refers to the "role and scope" of a school with respect to matters such as "number and level of degree programs," "the fields in which degrees are granted," the extent of "research," and "areas of public service responsibility." PA 140a. When missions were assigned in 1981, MSU, UM and USM were designated "comprehensive," JSU "urban," and the other four schools "regional." PA 141a-42a. The 1981 mission statement is discussed at pp. 40-41, *infra*.

[68] The dissenters below wrote: "The [mission] designations, based on the resources existing in 1981, were thus objective labels for past discriminatory practices." PA 94a. They added (PA 66a): "Channeling the most money to the comprehensive institutions thus perpetuated the discriminatory funding practices rebuked by the Court as *de jure* in 1962 [footnote omitted]." See also JA 1382-83 (Dr. Leslie's explanation of why he did not follow "mission precepts" in his analysis).

[69] These policies and practices include the following: (a) an intentionally discriminatory testing requirement (see *supra* at 15-

Dr. Leslie testified that a historical pattern of funding has a continuing impact on institutional quality.

> The quality of the faculty, the facilities, the curriculum, the students today is the product of past as well as present formulas in previous financing budgets. JA 1393; see also JA 1381-82, 1394-97; Tr. 594.

Overall, Dr. Leslie concluded that "between white and black students in the State, between traditionally white and black institutions" "there is an accumulated deficit due to long term financial disparities." JA 1397.[70]

In contrast, the court's findings stressed the Board's "present funding formula." PA 157a-60a.[71] The formula has not included any factor based on the premise that earlier funding was not equitable to the HBIs and their students. JA 1661.[72]

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16); (b) higher minimum test score requirements at HWI and more expensive exceptions at HBIs (see *supra* at 19-20); (c) failure to publicize "high risk" exceptions at HWIs (see *supra* at 20-21, n.38); (d) few black faculty and administrators at HWIs (see *supra* at 11-14); (e) unremedied harassment of black students at UM (see *supra* at 22-25).

[70] Neither the Board's experts (Tr. 3013-58, JA 1679-80), nor the court analyzed this factor.

[71] Despite its finding of earlier discrimination in resource allocation (PA 169a), the court framed the issue as follows: "The court heard expert witnesses testify pro and con on the issue of whether the present funding formula unconstitutionally discriminates against the predominantly black universities and therefore against the plaintiffs themselves." PA 160a.

[72] The court did find, citing JA 1271, that "depart[ures] from the pure formula allocation" "have benefitted the predominantly black institutions"—noting expenditures of $3,172,849. PA 162a. However, JA 1271 also reveals that one small HWI, MUW, benefitted by "depart[ures]" of $4,014,493 in this period. The court also found that certain "groupings" in implementing the formula greatly benefitted MVSU and JSU. PA 161a-62a. However, the underlying evidence (JA 1272-75) revealed that this process provided less to ASU; and the evidence covered only the post-complaint period (1981 to 1988), without addressing the "accumulated [funding] deficit." Moreover, DX 357 revealed that for 1986-87, the three HBIs had the three lowest appropriations per full time equiva-

11. *"Program Review" Confirmed the "Accumulated Deficit" in the Funding of HBIs and Their Students*

Beginning "[i]n 1980, all programs below the doctoral level except certain professional programs were subjected to an intensive six-year review," termed "program review." PA 142a; JA 1733. Its purposes included identifying "marginal programs," *i.e.*, those of "sub-par quality." JA 1738; see also JA 1733-34. It began with "pilot review of a selected few programs to test the process; . . ." PA 142a. "Program Review" revealed unambiguously, the continuing impact of the historic underfunding of HBIs.

Pilot reviews revealed disparities in program quality at HBIs related directly to resource allocation. For example, there were "obvious immediate equipment and library needs" in the chemistry program at MVSU, with "[t]hese two categories of need . . . readily apparent in many other areas at [MVSU]." JA 1292. The review of English programs found libraries to be inadequate at ASU and MVSU. *Id.*[73]

In program review, "a little less than half" of ASU's programs and "somewhat over half" of MVSU's programs were classified as "marginal", that is, of poor quality. JA 1748. The next highest percentage was MUW with 16 percent of its programs classified as "marginal." Tr. 3668. Seventy-five percent (75%) of the marginal programs were at HBIs. JA 1738.[74] At ASU, "most of the

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lent student. See also Tr. 4377 (Dr. J. Peoples, former President of JSU; formula manipulated against JSU by refusing to allow JSU to include within its investment in the instructional program monies secured from the federal government and foundation grants); and PX 366(b), pp. 7-9, Exh. 2, p. 1 (offer of proof) (Tr. 2919) (Board used "[v]arious means . . . to concentrate resources into the [HWIs, rather than HBIs] [such as placing there] Special Bureaus, Research Centers [and] Centers of Excellence . . .").

[73] These conclusions were consistent with other evidence. See JA 314 (smallest libraries at ASU, MVSU); see pp. 37-38, *infra* (gross disparity in equipment expenditures; lowest at MVSU).

[74] Of the total pool of "marginal programs," institutions had the following percentages: MVSU (29%), ASU (27%), JSU (19%),

program deficiencies" related to inadequacies in "library holdings," "instructional equipment" including "computer equipment" and the need for "additional faculty." JA 1531. At MVSU, "facilities needed improvement," "in some instances, the faculty load was too great," "faculty qualifications" were deemed inadequate, "faculty salaries were too low," "academic support and equipment were not found to be adequate," library holdings [were] inadequate," and there were "some curriculum inadequacies . . . ." JA 1870-72.

While program review was viewed as "a path to improve the qualify [of programs]" (JA 1738), the Board did not provide additional resources to the schools having marginal/poor quality programs (JA 1739, 1869, 1872-73), disproportionately the HBIs. The institutions were expected "to shift resources in house to [correct deficiencies]." JA 1743, 1873 (". . . we had to take from other areas, which caused them to be deficient, in order to bring these up to par and not lose that particular course of study.").

12. *The HWIs Continue to Have Superior Facilities*

The district court found that the Board's historic racial discrimination included the provision of less adequate facilities at HBIs. PA 166a, 169a. "The character of the [HBIs] in 1954 was acknowledged to be inferior or unequal to that of the [HWIs] at that time." PA 166a.[75] Unrebutted evidence presented at trial shows that the facilities at HBIs continue to be of an *inferior character.*

DSU (10%), MUW (9%), MSU and UM (3% each), and USM (0%). *Id.*

[75] The court defined character (PA 165a-66a): "The particular mix of facilities found at a given institution defines its 'character.' Objectively, one might include such factors as the age and construction type and design of campus buildings, their condition, ease of access, extent of land holdings, ability to expand, and visual images in defining institutional character. The subjective factors include the opinions of the academic community and the media and the opinions of parents, alumni, and students."

The district court found that space had been added to the universities through the years so that there was "no correlation between the amount of campus space [in terms of 'net square feet of space per full-time equivalent student'] and the historical racial designation of the institutions." PA 165a. Private plaintiffs do not dispute this finding, but note that the pattern at trial resulted from decreased enrollment at HBIs.[76]

The district court "perceived no racial pattern with respect to the condition of facilities." PA 195a. The court also found as follows: "Mr. [Richard] Dober testified he found no correlation between the racial identity of the institutions and the quality of the facilities at the institutions and the court so finds." PA 166a. A review of Dober's testimony shows that he testified only about the condition of facilities (i.e., state of repair), *not* their *quality* in the global sense encompassed by the court's definition of "character," of which "condition" was but one element (see n.75).[77]

Once the focus moves beyond the existence of space and its state or repair, the evidence of superior facilities at the HWIs is unambiguous. See PA 67a, n.40 (dissenting opinion).

U.S. expert Harvey Kaiser presented in USX 836q information on total investment for equipment, as follows:

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[76] JA 596 shows that in 1985-85 the HBIs were at 76.0% of their peak enrollments and HWIs at 91.9%.

[77] On direct examination, Dober testified to a lack of a racial pattern in the *condition* of facilities, based upon a quantitative analysis of institutional self-reports of building "sub-systems that were in poor or worse condition. . . ." JA 1813-14; DX 304, p. 27. Dober agreed that (a) his study did not address "better facilities" (JA 1816); (b) he was "studying the square footage as opposed to really the quality of the square footage" "[e]xcept that quality may be a reflection of condition . . ." (JA 1818-19); (c) he did not "make a judgmental quality difference by saying that this is an A facility, this is an A+, this is C, this is C+ . . ." (JA 1819-20); and (d) "we have not introduced qualitative factors into any of our studies." JA 1820.

	3 HBIs	5 HWIs
Total Book Value	$10,466,443 (11.7%)	$79,331,647 (88.3%)
Average Book Value	$ 3,488,814	$15,866,329

Four largest book values were for the HWIs, DSU, MSU, UM, and USM; smallest book value was the HBI, MVSU.

The average book value of all universities was $11,224,761, with all HBIs well below average, including JSU at $3,443,607.

Kaiser's facilities report depicted the *current* dollars necessary to replace the facilities at the eight schools in 1984-85, as follows (JA 607).

	3 HBIs	5 HWIs
Total Replacement Value	$168,067,958 (18.3%)	$752,098,231 (81.7%)
Average Replacement Value	$ 56,022,653	$150,419,646

Three largest replacement values were for the HWIs, MSU, UM and USM. Two smallest replacement values were for the HBIs MVSU and ASU.

The average replacement value of all schools was $115,020,774, with all HBIs well below average, inculding JSU at $74,315,678.

Dr. Kaiser did testify about the quality of facilities in a global sense, concluding that those at the HWIs were superior. JA 1354-58, 1360, 1367-68, 1370.[78] Kaiser noted that dollars spent later in time, as was disproportionately the case at HBIs (PA 163a-64a), bought less due to inflation. JA 1356-57, 1362-64; see also JA 1454-55 (Board's executive secretary). He also testified that the higher ratio of net to gross space at HBIs meant that the space was "not as generous or with as much ambience as [space at] the traditionally white institutions." JA 1358, 1360.[79]

Testimony of State Senator Douglas Anderson, formerly a member of the State Building Commission (JA 1562-63), buttressed Dr. Kaiser's view. Anderson testified to four instances in which the Board favored "cutting cor-

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[78] Kaiser visited all of the schools (JA 1351), and analyzed facilities extensively. See Tr. 351 and USX 836a-t.

[79] The net to gross ratio for all HBI space is 77.5% and that for all HWI space 63.4%. JA 598-99 (calculations made).

ners" on construction at HBIs (JA 1564, 1565-69), "problems [which] never existed at the predominantly white institutions." JA 1569.

Dr. Kaiser also testified that in terms of facilities and equipment, (a) MSU, UM and USM was each superior to JSU (Tr. JA 1354-55, 1359-60, 1366-69, 1376-77. See also JA 606-07, 611); [80] (b) DSU was superior to MVSU (JA 1355-56, 1368-70, 1372-73; see also JA 606-07, 611); and (c) MSU was superior to ASU. Tr. 1353, 1355-56, 1369, 1372-73; see also JA 606, 607, 611.

Thus, the evidence revealed that the more recent expenditure pattern cited by the district court (PA 163a-64a) did not overcome the discriminatory head start provided HWIs and their students. See generally JA 1371, 1373, 1379-80 (Kaiser). Neither Board expert Dober (see JA 1823, 1824-25), nor the court addressed these points.[81] The court found, ultimately, that the Board

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[80] Board expert Dober testified that JSU is "severly underbuilt." JA 1816-17. His work did not address "whether or not the facilities at [JSU] are adequate for . . . a research institution[.]" Tr. 4840. U.S. expert Kaiser "characterize[d] [JSU] as a research university, although it does not have . . . adequate facilities and equipment to support a graduate research university." JA 1353; see also JA 1354-55, 1371-72.

[81] The court's findings of more recent expenditures favoring HBIs were flawed, failing to account for all categories of expenditures shown by the Board exhibits which it cited, or other evidence.

Repair and renovation appropriations (1981-86). The court ignored "institutional funds" spent on "major repairs and renovations," controlled by the Defendant Board (USX 636, pp. 3, 5, #'s 8, 14), which were HBIs $130,897 (1.2%) and HWIs $11,241,817 (98.8%). DX 331-38, passim.

State appropriations for new construction. For 1970-80, the supporting evidence (JA 1258, 1452-53) did not address use of "self-generated funds" (JA 1453-54), and excluded funds for the "School of Veterinary Medicine" (JA 1258) at MSU—an expenditure of $35,000,000 (JA 1453-55), which further enhanced that HWI. JA 1424; see also JA 1570-71. *For 1981-86,* the supporting testimony, asserting that DSU and MSU received no "state appropriations" (JA 1453-54), can not be squared with defendants' exhibits showing receipt of $433,183 (DSU) and $5,687,382 (MSU). DX 332, p. 2; DX 334, pp. 1, 11, 14. Moreover, this analysis excluded

provided HBIs facilities *commensurate with their missions.* PA 166a, 195a. Yet, as shown by the next section of this factual summary, and the *en banc* majority found, the after-the-fact mission designations of 1981 "had the effect of maintaining the more limited program scope at the historically black universities. . . ." PA 31a. In short, the court used a discriminatory criterion to measure the adequacy of facilities.

13. *The Institutional Mission Designations Adopted by the Board in 1981 Have the Effect of Maintaining the More Limited Program Scope at the HBIs*

In late 1981, after their shaping by racial discrimination, the Board established "missions" (see n. 67 above) for the eight schools. MSU, UM and USM were designated "comprehensive," which indicated greater breadth with respect to number and level of programs, leadership in particular disciplines, and research. PA 141a; JA 865-66. JSU was designated an "urban" university, indicating a "mission . . . to instruct in research and public service with particular emphasis on the needs of the urban community in which it is located." PA 141a-42a.[82] ASU, MVSU, DSU and MUW were designated "regional," "a more limited programmatic focus," and generally "expected to restrict course offerings to quality undergraduate instruction." PA 142a. The court found "that the defendants' designation of mission in 1981 was not motivated by a discriminatory purpose but was instead neces-

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institutions' "self-generat[ed] funds" (JA 1453-54), also subject to defendants' control (USX 636, pp. 3, 5, #'s 8, 14), where MSU spent $20,532,320, UM $1,760,000, and HBIs zero dollars from 1981-86. DX 331-38 passim (category of "other" funds).

[82] The Board's executive secretary contrasted JSU with the comprehensives, as follows: "It is more limited in the areas of study and levels of study and research and public service responsibilities." JA 1443. Dr. John Peoples, former JSU President, testified in effect, that JSU was labelled "urban," but not given the corresponding programs. JA 1874-1877.

sitated and justified by a need to conserve scarce educational resources." PA 193a.[83]

Irrespective of purpose, the record is conclusive that the "then existing programs, facilities and other educational resources" of the institutions (PA 193a) were the dominant factor in designating mission. The text of the mission statement,[84] the testimony of Dr. Thomas Meredith, the Board's Associate Director for Programs and Planning as of 1981,[85] and the opinion below (PA 193a) establish this point. In contrast to the Board's 1974 Plan of Compliance, which gave priority to enhancing programs at the HBI's (see p. 28, *supra*), the 1981 mission statement was geared to maintaining the status quo[86]—and the *en banc* court so found (PA 31a):

> The record . . . supports the plaintiffs' argument that the mission designations had the effect of maintaining the more limited program scope at the historically black universities. . . .[87]

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[83] As there was no remedy proceeding, there was no opportunity to determine whether other or modified designations could meet the state's resource needs and better promote disestablishment.

[84] See *e.g.*, JA 866 (MSU, UM and USM "will *continue* to offer a number of programs on the doctoral level."); JA 867 ("Each institution *is expected to remain* actively involved in organized research.") (emphasis added).

[85] "[W]e looked at the makeup of the institutions *at that time* in terms of enrollment and faculty and resources that they *were putting* into particular disciplines and areas. We looked at *areas in which they had traditionally had strength*. The research in which they *were involved*. That is just to give you an example, those kinds of things to determine mission." JA 1744; emphasis added.

[86] See JA 1744-46 (Meredith testimony); JA 865 ("Proposed new programs outside of the present role and scope of an institution would require extraordinary justification before being considered by the Board of Trustees."); JA 1323-24 ("mission statement . . . precluded in lots of meaningful ways the development and enhancement of the traditionally black institutions"); JA 1659.

[87] The dissenters below recognized even more clearly how the mission statement built upon and perpetuated prior discrimination. PA 94a.

SUMMARY OF ARGUMENT

Longstanding racial discrimination often shapes services in ways causing continued harm to black citizens even after the cessation of overt discrimination. Therefore, in keeping with its central purpose, the Fourteenth Amendment imposes upon officials an affirmative duty to eliminate the current effects (or vestiges) of prior discrimination as far as practicable. There is no principled basis for failing to apply this standard to higher education. See pp. 43-46, *infra*.

An enforceable regulation, 34 C.F.R. § 100.3(b)(6)(i), imposes the same standard, independently. Indeed, this court would ordinarily address the Title VI claim first. That "race neutral" actions, alone, do not satisfy the regulation is plain not only from its text, but also from other relevant evidence (*e.g.*, its past application and detailed administrative guidelines applying the regulation to discriminatory higher education systems). See pp. 48-49, *infra*.

The lower courts found that the use made of the ACT in admissions was no longer discriminatory by "magic." They merely asserted that "continu[ing]" the discriminatory use was a new, benign action. See pp. 50-51, *infra*.

Scrutiny of the components of the Mississippi system historically subject to racial discrimination, in the light of correct standards, warrants but one conclusion: the separate and unequal system is substantially intact. The vestiges of state imposed racial discrimination persist in the areas of college-going and completion rates, student enrollment, employment of administrative staffs and faculties, denial of equal educational opportunity, and the environment for black students at UM. The *en banc* court could only reach a contrary result by, for example, finding in effect that white students had a "real freedom of choice" of HBIs (PA 2a), while also finding that those schools continue to be plagued by program disparities reminiscent of the *de jure* system. PA 37a. See pp. 46-48, 51-61, *infra*.

The development of more effective, practicable remedies is conceivable. See pp. 61-62, *infra*.

The lower courts explicitly declined to apply the relevant affirmative duty; the results pervade their analyses. They also foreclosed petitioners' right to a remedial proceeding by speculation, and overstated the deference due officials administering the very elements of the system manipulated racially. See pp. 62-66, *infra*.

Bazemore v. Friday, 478 U.S. 385, 407-09 (1986) addressed one asserted vestige of discrimination without identifying any possibility of a further practicable remedy. Moreover, *Bazemore* did not approve the superimposing of choice on "a loaded game board." as here. See pp. 65-66, *infra*.

This case should be remanded to the district court for development of remedies. Consistent with constitutional and Title VI standards, these remedies, must, in part, provide greater higher educational opportunities for black citizens, increase their access to HWIs, and bring about substantial white enrollments at HBIs. Such remedies will bespeak the "[equal] status in the community" [*Brown v. Board of Education*, 347 U.S. 483, 494 (1954)] of all persons. See pp. 67-70, *infra*.

ARGUMENT

I. IN INSTANCES OF SYSTEMIC RACIAL DISCRIMINATION, THE FOURTEENTH AMENDMENT REQUIRES STATE OFFICIALS TO CEASE INTENTIONAL DISCRIMINATION AND ACT AFFIRMATIVELY TO ELIMINATE ITS EFFECTS TO THE EXTENT PRACTICABLE

A. The Controlling Principle and Its Applicability to Higher Education

This Court has frequently addressed systemic racial discrimination by governmental agencies. In these endeavors, the Court has long recognized that the mere cessation of intentional discrimination does not end the possibility of harm to black citizens. This is the case because racial discrimination often shapes the "land-

scape" in a way which, if unremedied, renders likely continuing injury to Afro-Americans.[88] Accordingly, the Court has formulated the following standard: officials responsible for racial discrimination in the conduct of government must not only cease purposeful discrimination, but also eliminate its continuing effects insofar as practicable.[89] Moreover, in cases involving public educa-

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[88] *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. at 931 (1915) (due to earlier racial discrimination in voter registration, exemption from literacy requirement would be less available to black persons) (Fifteenth Amendment); *Louisiana v. United States*, 380 U.S. 145, 154-55 (1965) (enjoining use of "new voter-qualification test" to which black citizens would be subjected disproportionately due to earlier intentional discrimination in registration process); *Green v. County School Board*, 391 U.S. 430, 438 (1968) (continuation of racially discriminatory educational system "[compounds] the harm of such a system" identified in *Brown I*); *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 339-40 and n.46 (1970) (approving relief which required formulation of new "jury list" in accord with Alabama law and constitutional principles; relief avoids trials pursuant to discriminatory list); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971) ("'Racially neutral' assignment plans proposed by school authorities may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation."); *Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973) ("Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation."); and *Milliken v. Bradley*, 433 U.S. 267 (1977) (relief to address students' "conduct and attitudes reflecting their cultural isolation" caused by earlier discrimination).

[89] *Louisiana v. United States*, *supra*, 380 U.S. at 154 ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."); *Green v. County School Board*, *supra*, 391 U.S. at 437-38 and n.4 (same); *Carter v. Jury Commission of Greene County*, *supra*, 396 U.S. at 339-40 n.46 (same); *Milliken v. Bradley*, *supra*, 433 U.S. at 280 ("[T]he decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of the discriminatory conduct to the position they would have occupied in the absence of such conduct'" [other citation omitted]); and *Board*

tion systems, this Court has repeatedly held that this obligation is an "affirmative" one;[90] for, *inter alia*, as a unanimous Court recognized in *Swann*, 402 U.S. at 28, "racially neutral" actions may be insufficient to overcome the effects of earlier discrimination.

This Court has never given plenary consideration to the applicability of the classic standard to a state system of higher education. However, neither legal, nor factual considerations warrant the type of global distinction made below, as comparison of higher education to the elementary-secondary context shows.

In each context, the Fourteenth Amendment, with the "clear and central purpose" of effectively combatting racial discrimination is invoked. See *Loving v. Virginia*, 388 U.S. 1, 10 (1967). Neither setting is a category "actually found in the [text of] the Constitution." *Board of Education of Oklahoma City v. Dowell, supra*, 111 S.Ct. at 636. In each instance the value of local control over education is directly implicated. In each, the legal justification of displacement of local authority is the manipulation to the detriment of Afro-Americans of policies and practices which are, ordinarily, controlled at the local level.

Similarly, consideration of origin, purpose, and injury support no global distinction. It is almost literally true that on "day one" the Mississippi legislature created a discriminatory system of elementary-secondary education, on "day two" *a discriminatory system* of higher education, each initially involving *no* education for black citi-

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of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 638 (1991) (". . . whether the vestiges of *de jure* segregation had been eliminated as far as practicable . . .").

[90] See *Brown v. Board of Education*, 349 U.S. 294, 299, 301 (1955) ("School authorities have the primary responsibility for elucidating, assessing, and solving these problems;" school board must "effectuate a transition to a racially nondiscriminatory school system"); *Green, supra*, 391 U.S. at 437-38; *Swann, supra*, 402 U.S. at 15-16; *McDaniel v. Baresi*, 402 U.S. 39 (1971); *Keyes, supra*, 413 U.S. at 200, 213; *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538-40 (1979).

zens, and on "day three"—stretching for more than 100 years—continued those systems as separate and grossly unequal. In each instance, the state's action rested on the pernicious notion that black citizens were less worthy than white citizens. Finally, the continuation of *each system*, when fair, more effective remedies are possible, subjects black citizens to further denials of services [*e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950)] and additional conduct "implying [their] inferiority in civil society" [*Brown v. Board of Education*, 347 U.S. 483, 490 (1954) (quoting *Strauder v. West Va.*, 100 U.S. 303, 307-08 (1880)], or, in other words, connoting "their [lesser] status in the community. . . ." *Brown I*, 347 U.S. at 494.

The elementary-secondary decisions also identify, clearly, the "effects" or "vestiges" of prior discrimination which are the subject of scrutiny in this case. As shown in the next section, they are the very facets of the Mississippi system which continue to mark it as separate and unequal.

B. The Application of the Controlling Principle in a Liability Context

A court's task in resolving a liability issue, like the one presented here, is as follows.

First. It must identify any continuing intentional discrimination. *E.g.*, *Louisiana v. United States*, *supra*, 380 U.S. at 154 (". . . bar like discrimination in the future").

Second. The court must identify the elements of the system originally organized on a discriminatory basis. *E.g.*, *Board of Education of Oklahoma City v. Dowell*, *supra*, 110 S.Ct. at 638 (noting that district court should examine "every facet of school operations" possibly subject to discrimination and listing six areas; also citing similar holdings of *Green* and *Swann*, *supra*).

Third. The court must accurately describe the current configuration of the element(s) of the system earlier organized in a discriminatory manner.[91] If racial con-

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[91] *E.g.*, *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 206 (1973) (noting proof of student, faculty, and staff segregation);

figuration continues, the court must presume a relationship between "current [conditions]" in the areas found to be infected by discrimination and the "prior intentionally [discriminatory] official acts. . ." [*Dayton Board of Education v. Brinkman*, 443 U.S. 526, 537 (1979)], excusing officials only upon their "show[ing] that the current [racially skewed pattern] is in no way the result of . . . past segregative actions." *Keyes, supra*, 413 U.S. at 211 n.17.[92] The court must also identify any collateral consequences "flow[ing] directly from constitutional violations . . ."[93], as well as remedial and other relevant steps undertaken by authorities.[94]

Fourth. If the record reveals that "discriminatory effects" (*e.g., Louisiana v. United States, supra*) or "vestiges of state imposed segregation" (*Swann, supra*, 402 U.S. at 15) persist,[95] the court at the *liability stage* need only consider whether it is conceivable that a remedial process may yield more effective relief.[96] Doubts at this stage should be resolved in favor of plaintiffs. It is also relevant that remedies may later emanate from many sources, the responsible officials, plaintiffs or their ex-

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see also *Jacksonville Branch NAACP v. Duval Cty. Sch. Bd.*, 883 F.2d 945, 948-50 (11th Cir. 1989) (setting forth statistics regarding administrative assignments, faculty assignments, department chairpersons, student assignments, and special programs).

[92] See also *Swann, supra*, 402 U.S. at 26; and *Jacksonville Branch of the NAACP v. Duval Cty. Sch. Bd., supra*, 883 F.2d at 951-52.

[93] *Milliken v. Bradley, supra*, 433 U.S. at 282, 283, 287-88 ("attitudes," "conduct," and "habits" as . . . the consequences of . . . *de jure* system . . ."

[94] *Green, supra*, 391 U.S. at 433-35; *Columbus Board of Education v. Penick*, 443 U.S. 449, 452-53; see also *Jacksonville Branch NAACP v. Duval County School Board, supra*, 883 F.2d at 947-49.

[95] The terms "effect" and "vestige" are used to refer to a present racial configuration, or other condition that was formed by or grew out of the prior de jure system, and that carries on the injuries inflicted by the prior system.

[96] *Brown II*, 349 U.S. at 294; *Green, supra*, 391 U.S. at 439-42; see also *Lau v. Nichols*, 414 U.S. 563, 564-65, 569 (1974).

perts, the court or its expert,[97] as well as administrative guidelines.[98]

II. PETITIONERS' TITLE VI REGULATORY CLAIM BUTTRESSES THEIR CONSTITUTIONAL ARGUMENT AND, ALTERNATIVELY, PROVIDES AN INDEPENDENT BASIS FOR REQUIRING AFFIRMATIVE ACTION TO ELIMINATE THE EFFECTS OF PRIOR RACIAL DISCRIMINATION

Petitioners also rely upon the regulations implementing Title VI of the Civil Rights Act of 1964, particularly 34 C.F.R. § 100.3(b)(6)(i). PPA 89. This provision[99] buttresses petitioners' constitutional argument, and, alternatively, provides an independent basis for the applicability of the standards, and the analytical approach, there described. Indeed, under well-settled principles, the Court would first address petitioners' plainly dispositive Title VI claim. *E.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 582-83 (1979).

Section 100.3(b)(6)(i) plainly requires, given the district court's findings of prior discrimination, not merely "discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures" (PA 26a, footnote omitted), but instead "affirmative action to overcome the effects of prior discrimination." Should there be any possible doubt that the provision supports petitioners' position, it is dispelled by three factors. These are the content of other sections of

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[97] See "Reply Brief of Private Petitioners," March, 1991, at 6-7 & ns. 7-10.

[98] See *United States v. Jefferson County Board of Education*, 380 F.2d 385, 390 (5th Cir. 1967) (en banc), cert. denied, *sub nom., Caddo Parish Sch. Bd. v. United States*, 389 U.S. 840 (1967) ("great weight to 1965 and 1966 HEW Guidelines").

[99] The regulation, promulgated pursuant to 42 U.S.C. § 2000d-1, has "the force and effect of law." *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). It is enforceable by private petitioners. See *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 593-95, 607 n.27 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (restating *Guardians Association* holdings).

the regulation;[100] the standards employed by HEW in applying Title VI to *the Mississippi system* of higher education;[101] and the content of HEW's 1978 administrative guidelines (PPA 90-96), titled "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education."

The "Revised Criteria" quote the text of 34 C.F.R. § 100.3(b)(6)(i) (which then appeared in 45 C.F.R.). PPA 91. They explain (*id.*):

> B. *Affirmative duty to take effective steps to eliminate de jure segregation*
>
> Where there has been past de jure segregation, states are *required to take affirmative remedial steps and to achieve results* in overcoming the effects of prior discrimination . . . (emphasis added).

The "Revised Criteria" require states to establish goals for progress in eliminating the effects of discrimination. See, *e.g.*, PPA at 94 (II.A., C., D., E.) (college-going and completion rates, attendance of white persons at HBIs). They also describe many "*affirmative* remedial steps [designed] to achieve results . . ." (emphasis added). See n. 128, *infra*.[102]

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[100] First, 34 C.F.R. § 100.3(b)(6)(ii) indicates that the goal of "affirmative action" is changed results; *i.e.*, "participation by persons of a particular race." Second, the relevant "illustrative application," set forth in § 100.5(h), shows that if abandonment of a discriminatory practice and informational activities do not produce "the full availability of a benefit," other steps are required to "ensure that groups previously subjected to discrimination are adequately served."

[101] In 1973, the Office for Civil Rights reported to the Board its conclusion that the Mississippi system "is not currently in compliance with Title VI . . . and with [the] Regulation." JA 196. OCR, in part, set forth student enrollment and faculty allocation *results* deemed to show inadequate progress in disestablishment. JA 197-200. See also proposed amicus brief herein of National Bar Association et al., at 23-25 (May 30, 1991) (similar standards applied by OCR to other states).

[102] The "Revised Criteria" are entitled to considerable deference in construing Section 100.3(b)(6)(i). *E.g., Lau v. Nichols, supra,*

III. APPLICATION OF THE CORRECT STANDARDS DEMONSTRATES MISSISSIPPI OFFICIALS' CONTINUING LIABILITY: INTENTIONALLY DISCRIMINATORY ADMISSION STANDARDS CONTINUE IN USE, THE SEPARATE AND UNEQUAL SYSTEM IS SUBSTANTIALLY INTACT, AND THE DEVELOPMENT OF MORE EFFECTIVE REMEDIES IS CONCEIVABLE

A. The Board Continues to Use the American College Test in an Intentionally Discriminatory Manner

The Board adopted the ACT and authorized its agents to set minimum scores "because of . . . [the] adverse effects" on black citizens. PA 179a. Shortly thereafter, the Board, by its agents, set exclusionary minimum scores. In 1976, the Board, directly, not only "continue[d]" these minimum scores, which continued to be exclusionary, but also added a more exclusionary use of minimum scores.[103] Treating *the continuation* of discriminatory behavior as an entirely new act, as the lower courts did (PA 179a, 32a), is totally arbitrary.

Under *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), the Board's "continu[ing]" use of minimum ACT test scores in the admission process is unlawful; their "original [adoption] was motivated by a desire to discriminate against blacks on account of race and [their use] continues to this day to have that effect." Under controlling

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414 U.S. at 566-67, 568 (relying upon HEW "guidelines" published in *Federal Register* to construe Title VI statute and other parts of same Title VI regulation); see also *id.*, 414 U.S. at 570-71 (concurring opinion of Stewart, J.) (same).

[103] The lower courts erred in treating the 1976 action as *the Board's* first step regarding minimum scores. PA 179a, 33a. The earlier establishment of minimum scores by HWIs (PA 121a) was by express delegation by the Board (*id.*), which controlled the matter (USX 636, p. 5, #12); it was, therefore, legally responsible. See *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978) (entity responsible for acts of ". . . . those whose edicts may fairly be said to represent official policy . . ."). Moreover, HWI presidents are named defendants.

precedent, the evidence of continuing discriminatory effect is clear.[104]

B. The Separate and Unequal System Is Substantially Intact

When the record is judged by the standards which petitioners have articulated, only one conclusion is possible: the vestiges of earlier discrimination persist; the separate and unequal system is substantially intact. See generally PA 37a-38a, 90a-94a (dissenting opinion).[105]

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[104] It may be summarized as follows: (a) a far smaller proportion of black high school graduates than white graduates attain the score of 15 or higher needed for regular admission to the HWIs. See p. 18, *supra* and *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 430 n.6 (finding a discriminatory effect where "high school diploma" and test requirements operated to "render ineligible a markedly disproportionate number of Negroes . . ."). (b) The existence of the criterion has had a deterrent effect on applications. "A lot of people take [the ACT] in their junior year and again in their senior year." JA 1855; compare JA 649 and 650 (from 1981-82 to 1985-86, total number of black youth taking ACT was from 2000 to 3000 greater than black graduates taking ACT). Thus, when black twelfth graders have applied to take the ACT, and faced a question about their preferred university (JA 1858), many have been aware that their ACT score would not be likely to qualify them for a Mississippi HWI. Defendants' expert [JA 876-77] and case law recognize the likely deterrent effect, upon making application, of discriminatory standards. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-67 (1977). (c) Many black persons have been excluded due to low ACT scores. See p. 16, *supra*.

[105] Affirmative, post-1962 Board actions are responsible, substantially, for this pattern: (a) creating a dual structure of admission standards and exceptions (pp. 19-21, *supra*); (b) eliminating black persons from the system (pp. 21-22); (c) denying JSU requests for doctoral programs (p. 29, n.58); (d) reducing MVSU's programs (p. 29); (e) adding new programs to white schools (p. 29); (f) locating new land grant programs at MSU (p. 32, n.65); (g) continuing greater expenditures on white students (p. 32); (h) adding $563 million of new facilities at HWIs from 1964-65 to 1984-85 (JA 607); (i) opening the veterinary medicine school at MSU in the 1970's (JA 1424); (j) continuing the gross disparity in equipment expenditures by expenditures from 1964-64 to 1979-80 of $63 million at HWIs and $8 million at HBIs (JA 611); and (k) locking in this pattern with the mission designations (pp. 40-41).

1. *Racial Disparities Persist in College-Going and Degree-Granting Rates*

The Board's 1954 acknowledgement that black citizens' lower college-going and degree-granting rates were part of the discriminatory system (JA 816-18) is consistent with the thrust of the Title VI regulations, particularly as construed by OCR in the "Revised Criteria." PPA 94. These consistent conclusions are based not only upon a realistic appraisal of the historic discrimination,[106] but also reflect the current needs of black citizens and the nation. Today, higher education is needed if black citizens are to enjoy reasonable economic self-sufficiency (see n. 15, *supra*) and partake of the increasing opportunities for leadership in the private sphere and service as an elected official. Our nation's ability to withstand economic challenge from abroad and to solve our many domestic problems require that all segments of the population be

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[106] Mississippi initially provided no higher education for black persons. See pp. 3-4, *supra*. It then, for more than a hundred years, provided separate and grossly unequal opportunities (pp. 4-7, *supra*), denying black families the resources (see p. 6, n.10, *supra*) needed to support their children's participation. These actions, in turn, left the black population with a lesser family tradition of college attendance. See Tr. 598, 3087. More recently, the Board decreased the black college-going population by expanding its use of its discriminatory testing requirement. See pp. 21-22, *supra*.

The validity of the Title VI standard is particularly clear. By 1978, HEW could also rely upon more than 10 years of experience in addressing problems of discrimination in elementary and secondary education (*e.g., Kelley v. Altheimer Pub. Schools*, 378 F.2d 483, 489 n.10 (8th Cir. 1967)], an area which the Board had found in its 1954 report to be connected to unequal levels of preparedness for college attendance. See pp. 5-6, *supra*. Under the general rule, HEW's construction of Title VI need only be "a reasonable one." *Chevron, U.S.A. v. Natural Resources Defense*, 467 U.S. 837, 845 (1984). Moreover, this Court has, unanimously, characterized one of its holdings in *Guardians Association, supra*, as to the effect that Title VI delegated to the implementing agencies the "complex determinations" of the particular problems within the statute's reach. *Alexander v. Choate, supra*, 469 U.S. at 293. Only prior state-imposed discrimination explains the disparities in college level participation and HEW can not be faulted for adopting that position.

deeply involved in higher education. See *United States v. Louisiana*, 692 F. Supp. 642, 656-57 (E.D. La. 1988), *order vacated*, 751 F. Supp. 606 (E.D. La. 1990).

Facts tell the tale. In a state where public school enrollment has long been in the neighborhood of 50% black, black enrollment was approximately 30% at the undergraduate level, 20% at the graduate level, and 5% or less at the professional level. See pp. 9-10, *supra*. With regard to degree-granting, black participation approximated the enrollments at the graduate and professional levels; it was depressed at the undergraduate level (approximately 24% of degrees contrasted with 30% of enrollment). *Id.* Despite having an "affirmative duty" [*e.g.*, *Green*, *supra*; 34 C.F.R. § 100.3(b)(6)(i)] to overcome each aspect of its earlier discrimination, the Board used the ACT, which it adopted for racially discriminatory reasons, in a way which significantly decreased black persons' participation. See pp. 21-22, *supra*.

2. *Student Enrollment*

The district court found that the universities "continue to be identifiable by the racial make-up of the student populations." PA 187a. No other reading of the statistical evidence is possible. For example, in 1985-86, seventy percent (70%) of the black undergraduate students in the system attended the three HBIs, while only 194 white students attended HBIs (1.8% of the schools' undergraduate enrollments). JA 624.[107]

The district court's finding that the pattern "is . . . the result of a free and unfettered choice on the part of individual students" (PA 187a; see also at 2a, "real freedom of choice") is premised upon a mistaken impression of applicable legal principles. Structural factors, traceable to discrimination, promoted or required segregated choices.

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[107] These statistics demonstrate that in terms of white community attitudes, the HBIs continue to be segregated black schools. *See Keyes*, *supra*, 413 U.S. at 196.

The *en banc* court found that "disparities among the institutions" "[were] very much reminiscent of the prior ["de jure segregated system]." PA 36a-37a.[108] Therefore, the major problem in this area—the failure of white persons to choose HBIs—can not realistically be viewed as the product of "real free choice." See *Sweatt v. Painter*, *supra*, 339 U.S. at 632-34; *Swann*, *supra*, 402 U.S. at 18-19 (racial identification of a school by "quality" factors).[109] Moreover, the court's general finding was only "the tip of the iceberg" regarding disparities.[110]

Judged by correct standards, the Board's use of the ACT continued to be intentionally discriminatory. Moreover, in view of HWI minimum score requirements and the pattern of scores by race, large numbers of black youth did not have a "real free choice" of those schools. Compare *Bazemore v. Friday*, *supra*, 478 U.S. at 407 (no

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[108] In contrast, when this Court alluded to "wholly voluntary and unfettered choice[s] of private individual" in *Bazemore v. Friday*, 478 U.S. 385, 407 (1986), it also cited a finding of non-discrimination "in . . . services. . . ." *Id.*

[109] See also *Plaquemines Parish School Board v. United States*, 415 F.2d 817, 831 n.24 (5th Cir. 1969) ("Free choice of schools can have no meaning where the choice is between schools which maintain athletic facilities and attractive grounds and schools which have no athletic facilities and grounds that are in a state of disrepair."); *United States v. School District of Omaha*, 521 F.2d 530, 545-46 (8th Cir. 1975) (series of factors racially identified school, including curriculum); JA 200-204 (OCR concluded in 1973 that due to program differences HBIs would be "unable to attract significant numbers of white students").

[110] See *supra*, for example: (a) programs at MVSU reduced to the point where its viability was threatened (p. 29 & n.59); (b) HBIs have relatively few graduate programs (pp. 28-29) and few "unique high demand programs" (p. 29); (c) in quality comparisons between pairs of HBIs and HWIs, the latter were almost always superior (p. 30); (d) the land grant program at MSU was "vastly superior" to the one at ASU (p. 31); (e) program review revealed the negative impact of longstanding funding disparities on the programs at HBIs (pp. 35-36) [see also JA 314 (ASU and MVSU had two smallest libraries)]; (f) there were vast disparities in expenditures for equipment favoring HWIs (pp. 37-38).

discrimination in membership once disestablishment began).

The HWIs recognized the interest of potential black applicants in the meaningful presence of black staff, but were token employers of black citizens compared to HBIs. See pp. 11-12, *supra*. This Court [111] and others,[112] have recognized that the staffing pattern extant in Mississippi will product racially-skewed choices.

Black citizens have not had an unfettered choice of UM. See pp. 22-25, *supra*, and *Green*, *supra*, 391 U.S. at 440, n.5. UM's grossly disparate enrollment pattern, especially when compared to other HWIs, shows that black students are very hesitant to attend the school.

The Board failed to fulfill its "affirmative duty" [*e.g.*, *Dowell*, *Green*, *supra*; 34 C.F.R. § 100.3(b)(6(i)], in many ways which bear upon enrollment patterns. In a period when its stated policy was to give HBIs priority as to new programs, to enhance their attractiveness to whites, it favored HWIs—and "ran down" Mississippi Valley. See p. 29, *supra*. The Board did not turn over the Universities Center to JSU, a school "underbuilt" in the view of the Board's expert. JA 1816-17.

The Boards' default with regard to admission policies *per se* is extensive. Here, it was to choose among "reasonably available" alternatives (*Green*, *supra*, 391 U.S. at 441) those conducive to the elimination of racial discrimination. *Id.* at 437-38; see also *McDaniel v. Barresi*,

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[111] *Swann*, *supra*, 402 U.S. at 18 (racial identification of schools "by reference to the racial composition of teachers . . ."); compare *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (Louisiana statutes requiring candidates' race to be placed on nominating papers and ballot "encourage[d] its citizens to vote for a candidate solely on account of race . . . ." in violation of equal protection clause).

[112] *United States v. Jefferson County Board of Education*, 372 F.2d 836, 883-86 (5th Cir. 1966), adopted in pertinent part, 380 F.2d 385 (1967) (*en banc*), cert. denied sub nom. *Caddo Parish School Board v. United States*, 389 U.S. 840 (1967); *United States v. School District of Omaha*, *supra*, 521 F.2d at 545-46; *Wall v. Stanly County Board of Education*, 259 F. Supp. 238, 253 (M.D.N.C. 1966); *Brown v. County School Board*, 245 F. Supp. 549, 560 (W.D. Va. 1965).

supra, 402 U.S. at 41 (the "disestablish[ment] of the dual school system . . ."). It did the opposite, providing for a *uniform pattern* of higher minimum ACT score requirements at HWIs, and more expansive exceptions at HBIs. See pp. 19-20, *supra*.[113] Obviously, this "approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel*, *supra*, 402 U.S. at 41.

ACT's manual termed "foolish" the nonuse of high school grades in admission decisions. JA 193. The Board foolishly used one test score to establish regular admission pools, although its survey of comparable universities indicated that none used one test score, *and* use of grades would likely be more racially inclusive. See p. 17, n.31 and pp. 18-19, *supra*.[114] The Board briefly approved, then eliminated, an excellent way to test capacity to succeed at a school, *i.e.*, probationary summer admission. See p. 19, n.34, *supra*. The HWIs either did not publicize, or use (MUW), their "high risk" exceptions. See p. 21, n.38, *supra*.[115]

3. *Employment of Administrative Staff*

The employment pattern of administrators remained virtually unchanged from 1962. See p. 11, *supra*.[116] The

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[113] Why other than to continue segregation didn't at least one of the largest HWIs have an ACT minimum score the same as the HBIs. It is to be recalled that test score requirements only arose when the first black person sought admission to an HWI.

[114] Why, for example, wasn't UM allowed, like JSU (PA 128a), to admit high school graduates with "B" or better grade point averages or ranking in the top 50% of their high school classes, without counting them against the "high risk" allowance?

[115] The district court's finding "that the defendants have used every reasonable means at their disposal in their [student] recruitment efforts" (PA 187a) is also infected by legal error. As shown above, these efforts operated on a game board "loaded" by lingering program disparities and schools identified by staffing patterns. Moreover, because the court scheduled only a liability hearing (p. 3, n.3, *supra*), plaintiffs were not notified of the need to offer remedial measures.

[116] The Board's remedial obligation encompassed the elimination of racial discrimination in this area. See, *e.g.*, *Rogers v. Paul*, 382

district court's characterization of the situation as "racially neutral" (PA 198a-199a) and the *en banc* court's avoidance of the issue (PA 35a) are concrete evidence of the hollow standards applied below.

Separate and unequal education was imposed on black Mississippians. Placing black citizens in leadership positions at HWIs, where they would govern blacks and whites, is obviously a vital part of showing that all groups are of "[equal] status in the community. . . ." *Brown I*, 347 U.S. at 494. Mr. Justice Stevens has put it best: "The inclusion of minority [personnel] . . ." ". . . is consistent with the principle that all [people] are created equal; the exclusionary decision is at war with that principle." *Jackson v. Wygant*, 476 U.S. 267, 316 (1986) (dissenting opinion). Yet, the courts below approved a situation where only two black citizens had ever been employed at the highest administrative levels in the five HWIs, and two HWIs reported not one black administrator and others a maximum of 2.9% black administrators.

UM's chancellor explained one need for black administrators:

> . . . . If universities are really to meet the needs of minority students, minority groups must be represented at every level of authority, especially the higher levels. I am not suggesting that black administrators be hired to represent a black constituency. Rather, blacks should be integrated into the existing administrative structure, thereby enriching the store of information and experience on which collegial decisions are made. [USX 625, p. 6]

Unfortunately, as of trial, UM's record in this sphere also remained dismal.[117]

U.S. 198, 200 (1965) (faculty); *Swann, supra*, 402 U.S. at 18 ("teachers and staff"); PPA at 94 (§ III.) (Revised Criteria").

[117] At MSU, the lack of black staff meant that four high level councils had 84 members—all white persons—functioning without an "enrich[ed] . . . store of information." See JA 1504-05.

4. *Employment of Faculty*

The HWIs are token employers of black faculty compared to HBIs. See p. 12, *supra*.[118] In contrast, HBIs had "substantial" proportions of white faculty (*i.e.*, 26% to 33%). PA 135a-36a. In attributing the fact that the five HWIs totalled only 60 black faculty to the scarcity of candidates (PA 136a-38a), the district court did not account for the three Mississippi HBIs' having 405 black faculty. See p. 12, *supra*.

These facts highlight ways in which the Board did not fulfill its "affirmative duty." *Dowell, Green, supra*; 34 C.F.R. § 100.3(b)(6)(i). As the legislature provided only "meager" funds for implementation of the "Plan of Compliance" (JA 1445-56), the Board did not implement its provision to overcome any shortage of candidates by developing "additional minority faculty." See pp. 13-14, *supra*. In the case of the "faculty clearinghouse," designed to allow a sharing of applicant pools, traditional ways of hiring superseded affirmative action. See p. 13, n.22, *supra*. Yet, piercing the *status quo* obviously is essential. *McDaniel, supra*, 402 U.S. at 41.

5. *Continuing Denial of Equal Educational Opportunity*

Black citizens have long been subjected to discrimination in resource allocation (*i.e.*, provision of facilities, funding, and programs). PA 114a-15a, 169a.[119] The *en banc* court affirmed, even though it found that program disparities reminiscent of the *de jure* system persisted.

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[118] The Board's remedial obligation extended to this area. See n.116, *supra*. It encompassed the elimination of the continuing disparities in faculty salaries (JA 1387-88; PA 56a [dissenting opinion]), which affect the quality of education available. See *Kelley, supra*, 378 F.2d at 491.

[119] The plaintiff class is entitled to be free of "invidious racial distinctions" in the allocation of resources. *Swann, supra*, 402 U.S. at 18-19; *Sweatt v. Painter, supra*; *Bazemore v. Friday, supra*, 478 U.S. at 407; *PPA* 94 (§ II.) ("Revised Criteria").

PA 36a-37a.[120] The lower courts' view was that any such differences were no longer relevant as the Board was thought to have provided all students real freedom of choice. PA 2a; see also PA 187a. This approach is infirm from a desegregation perspective (see p. 54, *supra*); it also is flawed with regard to equal opportunity.

One problem with this approach is that HWI admission standards did not provide for admitting numbers of students with ACT scores of 9 to 14 at all close to those enrolled in the system, as data for a four-year period, 1983-84 through 1986-87, shows.

Approximate total of "high Risk" Positions at HWIs	1,864	[Note: MUW used none of its 250 positions]
Students with ACT 9 to 14 Admitted to 3 HWIs	1,177	[Citations: see PX 287; JA 831, 1159, 1161, 1163, 1165, 1167, 1169, 1171]
Students with ACT 9-14 Admitted to 3 HBIs	4,726	

Thus, thousands of black persons could only be educated in HBIs.

Moreover, a number of practices required or promoted attendance of black persons at HBIs. These are the intentionally discriminatory minimum ACT score requirements at HWIs; tight limits on exceptions to the minimum score standards at the HWIs; the HWIs' failures to publicize (or use) the exceptions;[121] the staff employment practices; and the racial harassment at UM.

Thus, the lower courts' conclusion—that if black persons receive less at HBIs, this is a circumstance they freely choose—is in error.[122] Petitioners also note that a

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[120] The continuing disparities have been detailed. See, *e.g.*, *supra*, p. 54, n.110, and p. 32 (funding), pp. 37-39 (facilities).

[121] It is noteworthy that USM, which did not publicize the exceptions, and whose president frankly testified that "we do not encourage students with less than 15 to come . . ." (p. 21, n.38, *supra*), used only about 62.5% (305 of 488) of its exceptions from 1883-84 through 1986-87. See PX 287; JA 831, 1173.

[122] A third problem with the lower courts' approach is that it envisions that all black students who desire better resources will join

student may choose an HBI due to its rural setting (ASU, MVSU), it urban setting (JSU), or because it has demonstrated an interest in helping students whose academic records are not as strong as would be hoped (in Mississippi, the three HBIs). A choice based upon these factors should not be conditioned on accepting an education still tainted by prior racial discrimination. *Frost v. Railroad Commission*, 271 U.S. 583, 593-94 (1926).

6. *Harassment and Discrimination Afflicts Black Students at UM*

The harassment and discrimination at UM were significant not only because of their impact on enrollment patterns. UM black students' rights to "an [educational] opportunity . . . *on equal terms*" (*Brown I*, 347 U.S. at 493, emphasis added) encompassed equal services, fair grading, freedom from degradation, and a safe environment.[123]

The problems at UM were within the purview of this action, in which the defendants include UM's chancellor.

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almost all of the system's white students at HWIs. This tact ignores the fact that the HBIs would continue to be segregated, as well as the need for disestablishment to be accompanied "equitabl[y]." *Brown II*, 349 U.S. at 300. See pp. 68-69, *infra*.

[123] *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (different treatment of black student within an HWI which "handicapped [him] in his pursuit of effective graduate instruction"); *Bazemore v. Friday, supra*, 478 U.S. at 407 (no discrimination in services); *United States v. Jefferson County Board of Education, supra*, 380 F.2d at 393 (5th Cir.) (*en banc*) (requirement of nondiscrimination "in any service, . . . activity, or program"); *Cooper v. Aaron*, 358 U.S. 1, 13, 16 (1958) ["The constitutional rights of (students) are not to be sacrificed or yielded to . . . violence and disorder"; these problems occurred, in part, within the school due to the actions of white pupils, see *Aaron v. Cooper*, 163 F. Supp. 13, 21 (E.D. Ark. 1958)]; *Morgan v. McDonough*, 540 F.2d 527, 532 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977) (denial of "the right of black students assigned to South Boston High School to attend, in safety, a desegregated school"; problems included misconduct by white students, inaction by the school's headmaster, and discrimination by the football coach, see *id.* at 530-31; school placed in receivership).

See Amended Compl., 4/7/75, para. 23. UM employees who engaged in misconduct were "officers or agents by whom [the state's] powers [were] exerted" and, therefore, subject to the commands of the Fourteenth Amendment. *E.g., Cooper v. Aaron, supra*, 358 U.S. at 17, quoting *Ex Parte Virginia*, 100 U.S. 339, 347 (1879). Additionally, their misconduct and that of UM's white students were vestiges of years of discriminatory state action in Mississippi in higher education and other spheres. *Milliken v. Bradley, supra*, 433 U.S. at 283, 287-88; *United States v. Montgomery County Board of Education*, 395 U.S. 225, 227 [124] (1969). Relief could require the Board to utilize its plenary power, in accord with its "affirmative duty," to provide for staff training, human relations programs, and other remedial policies.[125]

C. The Development of More Effective Remedies Is Conceivable

The existing record identifies remedial approaches which should be considered carefully.[126] At minimum, *plaintiffs* should have an opportunity to demonstrate prac-

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[124] "Many other states had for many years maintained a completely separate system of schools for whites and nonwhites, and the laws of these states, both civil and criminal, had been written to keep this segregated system of schools inviolate. The practices, habits and customs had for generations made this segregated school system a fixed part of the daily life and expectations of the people."

[125] See, *e.g., Evans v. Buchanan*, 582 F.2d 750, 772 (3rd Cir. 1978) (*en banc*), cert. denied, 446 U.S. 923 (1980) (staff in-service training and human relations program). In addition, grievance policies could be publicized and the consequences of racially-oriented misconduct by staff, or students emphasized.

[126] The record suggests the following possible approaches: (a) use of high school grades and other data suggested by ACT to identify qualified students for regular admission (JA 1209-10); (b) elimination of the pattern of uniformly higher minimum requirements at HWIs and more expansive exceptions at HBIs, without diminishing the enrollment of black persons (pp. 19-20, *supra*); (c) reinstating summer probationary admission (p. 19, n.34, *supra*); (d) consistent, full notice of admission standards, including exceptions (pp. 19-20, *supra*); (e) implementation of a faculty clearinghouse (p. 13, n.22, *supra*), or other more centralized control over

ticable steps. Judicial decisions [127] and the "Revised Criteria" [128] also identify steps worthy of consideration.

IV. MANIFESTATIONS OF THE LOWER COURTS' FAILURES TO APPLY THE REQUISITE AFFIRMATIVE DUTY, AND OTHER CRITICAL ERRORS, PERVADES THEIR ANALYSES

A. The Critical Errors in the Lower Courts' Approaches

Each lower court explicitly held that the Board did not have an affirmative duty to eliminate the effects of prior racial discrimination as far as practicable. PA 24a-26a; 171a-72a. The consequences for Mississippi's black citizens have been described. The Board will in the main continue to afford them separate and unequal educational opportunities, in a system the contours of which continue to communicate their unequal status. See PA 90a-91a (dissenting opinion).

Manifestations of the lower courts' failures to apply the controlling legal standards pervade their opinions.

First. The lower courts focused upon current lack of discriminatory intent. PA 200a, 201a, 37a. However, the issue, given the findings of earlier, pervasive discrimination, was the Board's "effectiveness" in eliminating the

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staff hiring; (f) implementation of the plan for faculty development proposed in 1974 (p. 13, *supra*); (g) in-service training and human relations programs (p. 61, n.125, *supra*); (h) turning over the Universities Center to JSU (pp. 25-26, *supra*).

[127] See *Geier v. University of Tennessee*, 597 F.2d 1056, 1062, 1062-63 (9th Cir.), cert. denied, 444 U.S. 886 (1979) (in higher education case, court notes that relocation of program from HWI to HBI produced "meaningful results"); PA 92a (salary incentives for staff) (dissenting opinion); *Jenkins v. State of Missouri*, 855 F.2d 1295, 1304-06 (8th Cir. 1988) (requirement of very substantial rather than "meager" funding of disestablishment efforts), affirmed and reversed in part on other issues, 110 S.Ct. 1651 (1990).

[128] These are, for example: enhancing the attractiveness to white persons of HBIs by improving their physical plants, equipment, program offerings, or financial support (PPA 93); reassigning programs, course offerings, or resources (*id.*); establishing significant land grant programs at HBIs (*id.*); providing compensatory instruction and financial aid (PPA 94).

vestiges of discrimination, not the purpose of its recent actions. *E.g., Dayton Board of Education v. Brinkman, supra*, 443 U.S. at 538.

Second. The lower courts failed to set forth the current configuration of some elements of the system which were found to have been organized on a discriminatory basis (*i.e.*, student enrollment, faculty and staff employment patterns, black citizens' college-going and degree-granting rates). They failed to recognize that certain effects of earlier discrimination destroyed any semblance of real freedom of choice (*i.e.*, staff allocation patterns, program disparities, harassment at UM), or negated claims that continuing disparities were neutral or justifiable.[129] They identified certain vestiges of earlier discrimination, but failed to provide for a remedy proceeding.[130]

Third. The lower courts cited an "affirmative duty" to discontinue discrimination and adopt and implement good-faith, race-neutral policies and procedures. PA 26a, 172a. Here, the courts viewed the first steps to be taken to comply with the applicable duty, as the only steps. See 34 C.F.R. § 100.5(h). Similarly, one finds the district court referring to "substantial affirmative efforts" (PA 201a), not curing discriminatory effects "as far as practicable." *Dowell, supra*, 111 S.Ct. at 638.[131]

Fourth. The lower courts focused upon good faith and neutrality (PA 2a, 26a, 37a, 177a, 201a), as well as whether existing policies and practices were "reasonable" (PA 8a, 10a, 181a, 201a), or "educationally sound" (PA 8a, 10a, 181a, 193a). However, as this Court recognized

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[129] *Re* funding disparities. See p. 33, *supra*.

[130] Petitioners refer to the findings of racially identifiable universities (PA 187a), "vast" disparities in land grant programs (PA 197a), program disparities, generally (PA 36a-37a), and mission designations constraining further development of HBIs (PA 31a).

[131] If the *en banc* court's standard is correct, not even these steps would be required in the future. Petitioners also note that the district court relied on practices following initiation of this action. The court discussed funding practices from 1981 to 1987 (PA 162a, JA 1272-75), construction practices from 1970-1980 and 1981-86 (PA 163a-164a), and faculty hiring beginning in 1974. PA 194a.

unanimously in *Swann*, "neutral" conduct will often fail to overcome well-entrenched discrimination. See 401 U.S. at 28. Furthermore, the proper focus, in a liability context, was not solely current practice, but also whether it was conceivable that a remedy proceeding would identify policies and practices more effectively disestablishing racial discrimination, while adequately serving state interests. See pp. 55-56, *supra*.[132]

Fifth. Much passive conduct was condoned, or ignored.[133]

The lower courts also concluded, improperly, that a remedial hearing would not yield remedies (PA 187a, 199a), or would only yield remedies destroying the higher education system. PA 24a-26a.[134] This speculation could not replace petitioners' right to a structured consideration of remedies. The courts viewed the administration of the system as insulated from review in a remedial context (PA 176a-77a, 188a-190a, 198a; 16a-17a, 24a), despite

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[132] The *en banc* court found that the belated mission designations froze in the more limited status of the HBIs (PA 31a), but gave this factor no weight, although the action flouted the affirmative obligation. *Dayton Board of Education v. Brinkman, supra*, 443 U.S. at 538; *McDaniel, supra*, 402 U.S. at 41. As there held, the designations were not valid merely because they were "commonly used [and] educationally sound . . ."; nor was it proper to assume, without a remedy proceeding, the inability to frame mission designations in accord with the affirmative obligation. Moreover, the mission statement was utilized, in turn, to justify continuing disparities in program quality factors (PA 146a), facilities (PA 195a), and funding. PA 196a.

[133] The Board did not implement the faculty clearinghouse (p. 13, n.22), the plan to develop new minority faculty (pp. 13-14), or the plan to give HBI's preference in program additions (p. 29). The Board did not require use in regular admission decisions of information beyond an ACT score (pp. 16-18). Its overall admission standards and mission designations (pp. 19-21, 40-41) perpetuated the status quo, rather than promoting disestablishment. The legislature provided limited funding of disestablishment efforts (pp. 13-14).

[134] The *en banc* court elevated its views on educational matters above those of HEW, which proposed in its "Revised Criteria," the very kinds of remedial approaches (p. 62, n.128, *supra*) that the court (PA 24a-25a) disparaged.

the prior racial manipulation of its elements. Manifestly, this approach can not, in view of the harm enshrined, be squared with the "central purpose" of the equal protection clause. *Loving*, *supra*. The courts overstated the deference due; they were not to retire, but instead, in devising remedies, to "take into account the interests of state . . . authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81; see also *Valley v. Rapides Parish School Board*, 702 F.2d 1221, 1226 (5th Cir. 1983) (accommodate local interests "where congruent with constitutional precepts").

B. The Lower Court's Erroneous Applications of *Bazemore*

In *Bazemore v. Friday*, *supra*, 478 U.S. at 407-09, the Court addressed "voluntary associations supported by the Extension Service" (at 408), "clubs" (*passim*). In this Court, the continuing segregation of local clubs was the sole vestige of earlier discrimination asserted. The lower courts had found that a policy of non-discrimination in membership had been adopted by the Service, publicized, inculcated in the staff, and followed. The Court emphasized that activities above the local level were "conducted on a fully desegregated basis." *Id.* at 407. There was no indication that any club had an admission standard (much less an intentionally discriminatory standard, or one different from another club). There was no indication of any structural factor—*e.g.*, staffing patterns; resource disparities, or harassment—likely to promote segregated choices. Indeed, the courts had found no discrimination in services. This Court's opinion did not discuss any possible additional remedial step(s). The setting, unlike the elementary-secondary context (explained by reference to *Green*), was not one where there was authority either to assign, or to deny admission to the club of choice. The Court held that "[i]n view of the District Court's findings, this case present[ed] no current violation of the Fourteenth Amendment. . . ." *Id.* at 408.

Bazemore may be seen as consistent with the classic remedial standard, given the absence of any reference to

a further available remedy. There, cessation of active discrimination, adoption of neutral criteria, *and* implementation of certain affirmative steps (*id.* at 407) were all that was identified as "practicable." *Dowell, supra.*

This case is distinguishable from *Bazemore* in three regards. First. Remedial possibilities (not including mandatory assignment), including those officially promulgated by the federal education authority, are advanced for consideration, to address multiple vestiges of earlier discrimination. Second. This case involves one of the most important functions of state government, afforded in institutions pervasively shaped by officials over many years, and subject to their plenary control—not "voluntary associations supported by the [state]." Finally, even if *Bazemore* constitutes a statement of general approach, rather than an application of the general standards to one lingering vestige, in one set of circumstances, it is of no comfort to the Board. This case involves a series of structural factors, previously identified, which belie any claim of "wholly voluntary and unfettered choice of private individuals," *id.* at 407.[135] *Bazemore* did not hold that choice could be superimposed on "a loaded game board," *Swann, supra,* 402 U.S. at 28.[136]

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[135] These factors are (a) the intentionally discriminatory test (pp. 15-16, *supra*); (b) the dual structure of the admission standards (pp. 19-20, *supra*); (c) the Board's failure to adequately notify students of the admission exceptions (pp. 20-21, n.38, *supra*); (d) the staffing patterns (pp. 11-12, *supra*); (e) the lingering program disparities (pp. 27-32, *supra*); and (f) the racially hostile environment at UM (pp. 22-25, *supra*).

[136] The courts below ignored these salient distinctions between the relevant facts of *Bazemore* and the facts of record here. Both the *en banc* majority and the district court treated *Bazemore* as resting entirely on the fact that the State did not mandatorily assign applicants to 4-H clubs ("choice alone," PA 22a, PA 171a-77a) and as announcing a general rule that in such circumstances, continued effects of prior segregation and discrimination were irrelevant. *Bazemore*, of course, was predicated upon the *absence* of any further practicable remedy for the single effect there cited. Moreover, as indicated in the previous note (and accompanying text), both courts below overlooked the influence of state officials' decisions and prac-

V. THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR DEVELOPMENT OF REMEDIES WITH INSTRUCTIONS WHICH INSURE THAT CORRECTIVE ACTIONS DO NOT INJURE BLACK CITIZENS IN THE VERY WAYS WHICH *BROWN v. BOARD OF EDUCATION ADDRESSED*

Petitioners respectfully urge the Court to remand this case for development of a remedial plan (as the panel proposed, PA 100a-02a).[137] Petitioners have shown that the findings below and other facts as to which "the record permits only one resolution," [138] evaluated in the light of rules concerning the connection between past discrimination and current circumstances,[139] support only one conclusion: the "vestiges of state imposed [racial discrimination]" continue. *Swann*, 402 U.S. at 15. Moreover, the development of more effective remedies is conceivable.

In *Brown II*, this Court remanded each consolidated case to the trial court, with instructions, for development of a plan "to effectuate a transition to a racially nondiscriminatory school system," 349 U.S. at 301. A similar approach—informed by experience after *Brown* and this record—is sought here.

In *Milliken v. Bradley*, 433 U.S. at 267 (*Milliken II*), this Court recognized that in the process of eliminating the effects of discrimination and "mak[ing] whole the

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tices upon the exercise of choice by applicants and potential applicants to Mississippi's universities, a setting very different from *Bazemore*'s complete lack of any "statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join," 478 U.S. at 408.

[137] Surely, remedial proceedings below, rather than further consideration of liability, are to be favored, if otherwise consistent with legal principle. Consideration of this case is undertaken: (a) 35 years after application of *Brown* to higher education, see *Hawkins v. Board of Control*, 350 U.S. 413 (1956); (b) 27 years since "[t]he time for mere 'deliberate speed' . . . [ran] out", *Griffin v. County School Board*, 377 U.S. 218, 234 (1964); and (c) 18 years since OCR found a "dual system", JA 196.

[138] *Pullman-Standard v. Swint*, 456 U.S. 274, 292 (1982).

[139] See discussion of *Dayton Board of Education* and *Keyes* at pp. 46-47, *supra*.

victims of unlawful conduct," "burdensome effects" upon the underlying *educational* endeavor must be avoided. *Id.* at 280, n.15. In Mississippi, the HBIs have, in the main, been fulfilling the responsibility of educating the black citizenry—a task allocated to them by Board admission standards and practices of the HWIs. The ensuing "transition" should, in keeping with *Milliken*, and the authorities requiring that each vestige of discrimination be addressed, witness more education for black citizens, their increased access to HWIs, as well as steps to bring about substantial white enrollment at HBIs [140]—not reduced black enrollment and the destruction of the principal proven instrumentality (the HBIs) for educating the victims of discrimination.[141]

A second factor, recognized in the elementary-secondary setting, is that the mode of disestablishment has the same potential for broad communication of black citizens' "[lesser] status in the community" [*Brown I*, 347 U.S. at 494] as the initial creation of the discriminatory system. Thus, the closing or downgrading of institutions with which thousands of black persons have formed attachments—as required or encouraged by state action—would inform *these persons*, and the white citizenry, that higher organization in Mississippi continues to be premised on the ascendancy of white persons. The require-

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[140] As the positive message of law—in the form of the Civil Rights Act of 1964 and the Voting Rights Act of 1965—has taken hold in Mississippi and other states, our country has witnessed changes in conduct and attitudes in the spheres affected by these laws, *i.e.*, public facilities and accommodations, employment, voting, holding elected office. Similarly, there is every reason to believe that as these changes continue and remedies remove the impact of prior discrimination at th HBIs, one will witness substantial numbers of Afro-Americans and white persons receiving education at HBIs in the future. There are, for example, large numbers of white high school graduates who score 9 to 14 on the ACT (see p. 21, *supra*); many could take advantage of the historic interest of the HBIs in those who perform less well at the high school level. JA 174, 175.

[141] Presidents and the Congress have recognized the past role of HBIs in educating the black citizenry in the face of the defaults by white officials in Mississippi and other states. See NCBL amicus brief, p. 49, n.101, *supra*, at 20-23.

ment that remedies not disproportionately burden black citizens has been recognized in the elmentary-secondary sphere.[142]

The Title VI regulation, as construed by OCR in the "Revised Criteria," provides independent support (p. 48, n.99, *supra*), for the principles which petitioners glean from the Constitution. The criteria provide (PPA 92, footnotes omitted):

> . . . [T]he criteria recognize the unique importance of traditionally black colleges in meeting the educational needs of black students. More than 80 percent of all black college graduates have been trained at black colleges. In the mid-seventies, black colleges continue to graduate almost forty percent of all blacks who receive college degrees.
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> * * * *
>
> The Department does not take this language to mean that the traditionally black institutions are exempt from the Constitution or the requirements of Title VI. To the contrary, traditionally black and traditionally white institutions are subject to the same constitutional and congressional mandate to provide an education to all citizens without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. . . . [T]he transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

The "Revised Criteria" require steps to enhance HBIs (PPA 93, I.A-H) to insure "that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices

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[142] See *Evans v. Buchanan*, 435 F. Supp. 832, 840-41 (D. Del. 1977), aff'd, 582 F.2d 750, 760-61 (3rd Cir. 1978), cert. den., 446 U.S. 823 (1980); *Lee v. Macon County Board of Education*, 448 F.2d 746, 753-54 (5th Cir. 1971); *United States v. School District of Omaha*, 521 F.2d 530, 546 (8th Cir.), cert. denied. 423 U.S. 946 (1975); *Brice v. Landis*, 314 F. Supp. 974 (N.D. Cal. 1969).

of segregation" (PPA 93), as well as practices to achieve parity in college-going and degree-granting rates. PPA 94, II.A-C., E.-G.

The content of Constitutional and regulatory standards are consistent. The remedial process must include steps which, *inter alia*, protect and build upon the existing educational opportunities of black Mississippians; and move the HBIs to real partnership in the system in order to: communicate that all Mississippians are persons of equal dignity and worth, attract substantial enrollments of white persons, and guard against reduced opportunities for black citizens. Such a system will make the "opportunity of an education" "available to all on equal terms." *Brown I*, 347 U.S. at 493. Such a system will properly be described as "a racially nondiscriminatory school system." *Brown II*, 349 U.S. at 301.

The instructions governing subsequent steps in the district court should also provide for

- attention to each vestige of discrimination identified in part C. above and matters related thereto;
- development of lawful admission standards;
- full opportunities for plaintiffs to respond to Board proposals and submit their own proposals, if deemed necessary; and
- prompt development of remedies; see p. 67, n.137, *supra*.

CONCLUSION

The time is long overdue for ending the dark history of Mississippi's resistance to the desegregation of its public colleges and universities. Long time past presidents of historically black institutions and historically white institutions have, consistent with Private Petitioners' position, recognized that the state system of higher education was discriminatory [JA 886-88] and that the state failed to take suitable affirmative steps to disestablish its discriminatory system. [USX 625].

The judgment dismissing the complaint should be vacated and the case remanded to the district court for development of a remedial plan.

Respectfully submitted,

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